

Supreme Court, U.S.

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IN THE OFFICE OF THE CLERK
Supreme Court of the United States

ROBERT JON GROVER, DAVID SCHLECHT
and SARAH SCHLECHT,
Petitioners,

v.

NORTHWEST STEELHEADERS ASSOCIATION, INC.,
RAYMOND D. DEZELLEM, RICHARD "RICK" ALLEN, and STATE
OF OREGON, by and through the Oregon State Land Board,
Respondents.

**On Petition for Writ of Certiorari to the
Oregon Court of Appeals**

PETITION FOR A WRIT OF CERTIORARI

MICHAEL T. GARONE *
DAVID F. BARTZ, JR.
SCHWABE, WILLIAMSON
& WYATT, P.C.
1211 SW Fifth Ave., Suites 1600-1900
Portland, OR 97204-3795
(503) 222-9981

GORDON HANNA
GORDON HANNA PC
242 Church Street SE
Salem, OR 97301
(503) 585-3408

* Counsel of Record

Counsel for Petitioners

QUESTIONS PRESENTED

- I. Whether the Oregon Court of Appeals correctly held that portions of the John Day River were navigable for title under federal law pursuant to the legal test set forth in *The Daniel Ball*, 77 U.S. 557, 19 L.Ed. 999 (1871), which requires that, at the time of statehood, the waterway was used, or was susceptible for use, as a highway for commerce over which trade and travel were or could be conducted in then customary modes of trade and travel on water?
- II. In deciding that the John Day River was navigable for title under federal law, did the Oregon Court of Appeals substitute for *The Daniel Ball* test a much less rigorous test, which requires mere evidence that a waterway is susceptible to being floated by Native American canoes, a test which has the practical effect of exposing hundreds, if not thousands of even extremely shallow waterways throughout the United States to being found navigable and upsetting the settled property right expectations of thousands of riparian landowners?

RULE 14.1(b) STATEMENT

The following were parties to the proceedings in the Oregon Court of Appeals and the Oregon Supreme Court:

1. NORTHWEST STEELHEADERS ASSOCIATION, INC., an Oregon nonprofit corporation, plaintiff-respondent;
2. RAYMOND D. DEZELLEM, plaintiff-respondent;
3. RICHARD "RICK" ALLEN, plaintiff-respondent;
4. STATE OF OREGON, by and through the Oregon State Land Board, defendant-respondent;
5. DAVID SCHLECHT, defendant-appellant/petitioner on review;
6. SARAH SCHLECHT, defendant-appellant/petitioner on review;
7. ROBERT JON GROVER, intervener-appellant/petitioner on review;
8. MIANI, WILLIAMSON & EVANS, defendant-appellants (in Oregon Court of Appeals only).

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IN THE
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No. ____

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Respondents.

**On Petition for Writ of Certiorari to the
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PETITION FOR A WRIT OF CERTIORARI

Robert Jon Grover, David Schlect and Sarah Schlect ("Petitioners") respectfully petition for a Writ of Certiorari to review the judgment of the Oregon Court of Appeals in this case. Petitioners previously sought discretionary review of the Oregon Court of Appeals' decision from the Oregon Supreme Court. The Oregon Supreme Court denied the petition for discretionary review without issuing an opinion on the merits.

OPINIONS BELOW

The opinion of the trial court is unreported (App., *infra*, 5a-10a). The opinion of the Oregon Court of Appeals affirming the trial court (App., *infra*, 11a-36a) is reported at *Northwest Steelheaders Ass'n, Inc. v. Simantel*, 199 Or. App. 471, 112

P.3d 383 (2005). Grover and the Schlects jointly petitioned for review of this decision to the Oregon Supreme Court, the state court of last resort in the State of Oregon. On October 4, 2005, the Oregon Supreme Court issued its order denying the petition for review. This order (App., *infra*, 37a-38a) has not been officially reported.

JURISDICTION

The opinion of the Oregon Court of Appeals was entered on May 11, 2005. The Oregon Supreme Court denied a timely Petition for Review on October 4, 2005. The jurisdiction of the United States Supreme Court is invoked in a timely manner under 28 U.S.C. § 1257.

STATUTORY PROVISION INVOLVED

This case does not involve federal statutes. Rather, it involves the “equal footing doctrine” under the Northwest Ordinance, which held that new states are to be admitted into the United States on an “equal footing” with the original states. *An Ordinance for the Government of the Territory of the United States, Northwest of the Ohio River* (July 17, 1787), (“*Northwest Ordinance*”). Article 4 of the *Northwest Ordinance* stated that navigable rivers leading into the Mississippi and St. Lawrence Rivers shall be “common highways free to the inhabitants of the said territory and the citizens of the United States as well as any other state. . . .” *Northwest Ordinance*, Article 4. Pursuant to the “equal footing doctrine,” as each state was admitted into the Union, title to the bed and banks of its navigable waterways passed from the federal government to the state, as an attribute of the state’s sovereignty. *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 228-29, 11 L. Ed. 565 (1845). The question posed by this case is whether the segments of the John Day River at issue were navigable in 1859 at the time of statehood so that title to the bed and banks of the River passed to the State of Oregon

under the "equal footing doctrine." If not navigable, the bed and banks of the River remained in federal ownership at the time of statehood and were thus capable of being transferred by the federal government to private purchasers as in this case.

STATEMENT OF THE CASE

This case involves the Oregon Court of Appeals' affirmation of the trial court's judgment that certain portions of the John Day River ("John Day River" or the "River") were navigable under federal law in 1859 at the time of Oregon statehood so that the ownership of the bed and banks of the River vested in the State of Oregon at that time under the "equal footing doctrine."¹ The case highlights the conflict between the fifty states along with recreational enthusiasts (looking for inexpensive recreational opportunities for primarily urban residents) and the private property rights of primarily rural residents who wish to preserve their ownership rights to the bed and banks of the streams that run through their lands.²

Petitioners contend that the Oregon Court of Appeals' decision distorts and significantly expands the concept of title navigability so that the states will be afforded a clear opportunity to claim the bed and banks of thousands of even the shallowest waterways throughout the United States in clear derogation of the private property rights of thousands of

¹ The stretches of the River involved in the case are between River miles 18 and 33 in the area of McDonald's Ferry, near where petitioners Schlect own property and River miles 133 and 135 in the area of Burnt Ranch. (Tr. Vol. 7, pp. 13, 91.) The transcript of proceedings will be referred to herein as "Tr. Vol." Exhibits entered into evidence at trial will be referred to as "Ex."

² It also poses a conflict between the federal government and the states because lands along nonnavigable rivers were not ceded to the states upon their admission to the Union and hence remained as federal property. Many of these lands were never transferred to private ownership.

landowners who, for many generations, have considered themselves to be the owners of the bed and banks of waterways that have traditionally been considered nonnavigable. Rather than obtaining property for parks and recreational purposes by compensating landowners for the taking of their property under the Fifth and Fourteenth Amendments to the United States Constitution, the states are instead offered a shortcut method to grab historically private land by the Oregon court's expansive and unprecedented definition of navigability, a definition that would render any stream upon which a Native American canoe can be floated during portions of the year a navigable waterway and which goes well beyond any prior decision of this Court.

All parties below agreed, as did the Oregon Court of Appeals, that the applicable federal test for navigability is that established by this Court in *The Daniel Ball*, 77 U.S. 557, 563, 19 L. Ed. 999 (1870):

Those rivers . . . are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as *highways for commerce*, over which *trade and travel* are or may be conducted in the customary modes of trade and travel on water. [Emphasis added.]

Because the federal test applies to the conditions of the waterway at the time of statehood, the parties presented substantial historical evidence at trial regarding the conditions and practices existing in the John Day River basin in the nineteenth century. Oregon was admitted to the Union on February 14, 1859. Throughout this litigation, petitioners herein have contended and shown that the John Day River was not navigable under federal law so that title to the bed and banks of the River did *not* pass to the State of Oregon when it was admitted to the Union.

While there were some disputed facts at trial, the majority of relevant evidence was not in dispute. The John Day River, a tributary of the Columbia River, runs from its headwaters in

the Blue Mountains through portions of central Oregon into the Columbia River. (Ex. 265, p. 8.) Petitioners David and Sarah Schlect own property in the area of McDonald's Ferry. (Tr. Vol. 7, pp. 83, 91.) Petitioner Robert Jon Grover, while not an owner of property on the segments of the River at issue herein, owns property at another location on the John Day River. He moved to intervene and was granted party status by the trial court.

The evidence established that, while Native Americans lived in both the lower and upper reaches of the John Day River, there is *no* historical evidence documenting any Native American canoe use on the John Day River. (Tr. Vol. 2, pp. 23, 133.)³ Although European trappers and later anthropologists documented canoe use on other rivers by other Native Americans living in the region, no one ever documented such use by Native Americans on the John Day. (Tr. Vol. 2, pp. 124-25, 130; Ex. 265, p. 12.) Archeological surveys in the area also did not uncover any evidence of Native American canoe use, although they did document the use of Native American foot trails directly along the banks of the River. (Ex. 121, pp. 8-9.)

Despite the lack of historical evidence of Native American canoe use on the John Day, an historian hired by the respondents, Professor Steven Beckham, testified that Native Americans used dugout canoes on other rivers throughout the Columbia Plateau. (Tr. Vol. 2, p. 23.) The Columbia Plateau is an expansive area reaching north from the interior of British Columbia and south to the headwaters of the Deschutes River, east from the Snake River and west to Hood River, Oregon. (Tr. Vol. 2, pp. 132-33, 136.) According to Professor Beckham, these canoes, which typically drafted

³ The Tenino (speakers of the Sahaptin language) occupied the lower stretch of the River, before River mile 100. The upper part of the watershed was inhabited by the Northern Paiute (otherwise known as Snake or Shoshone), speakers of a different language. (Tr. Vol. 2, pp. 22-23.)

only six to eight inches, were used for travel, fishing and transport of obsidian, dried salmon, bear grass, shells, smelt and other items on the Columbia River. (Tr. Vol. 2, pp. 110-11.) Based on historical evidence that Native Americans fished from canoes on other rivers in the Columbia Plateau (but not on the John Day River), Professor Beckham testified that there was no reason why the Tenino, who lived in the lower John Day River basin, would not also have fished from canoes on the John Day River.⁴ (Tr. Vol. 2, p. 271.)

Evidence of early pioneer use of the John Day River was scant. Brigades from the Hudson Bay Company exploring the John Day River did so by horseback and not by boat. (Tr. Vol. 2, pp. 32-33.) Fur trappers used the Deschutes River, a river approximately 25 miles west of the John Day River, to ship furs back to the Hudson Bay Company forts, but did not use the John Day River for this purpose. (Tr. Vol. 2, pp. 32-33, 138.)

In 1858, the United States Army was looking for an expeditious route to move troops and material against the Mormons in Salt Lake City. (Tr. Vol. 2, p. 43.) The Army explored the region by horseback and not by boat. Army reports confirmed that the nearby Deschutes River could prove to be navigable, but there was no such conclusion in regards to the John Day River. The explorations led to the building of a wagon road in the vicinity as a means to provide a highway for commerce through the John Day River country. (Tr. Vol. 2, pp. 43-44, 221-23.)

In 1861, gold was discovered in the upper John Day River Valley (Ex. 265, p. 31.) This triggered a gold rush in 1862. There was no evidence that the John Day River was ever used to transport gold. (Tr. Vol. 2, p. 216.) Miners, pack trains carrying food and mining equipment, express riders carrying

⁴ However, Professor Beckham did not testify that Native Americans used the John Day River to transport goods to be traded.

letters and newspapers, and stage service all traveled *by land* from The Dalles, Oregon (a town along the Columbia River) into the John Day River country. (Ex. 121, p. 10.) The situation on the John Day differed significantly from other mining regions in the Pacific Northwest where steamboat travel was conducted. (Ex. 121, p. 11.)

In approximately 1862, pioneers began to settle in the John Day watershed. (Tr. Vol. 2, p. 47; Ex. 265, p. 33.) Miners settled in the upper John Day River Valley and cattle drivers laid claims to lands downstream. (Ex. 265, p. 33.) There is *no* historical record of the shipment of grain or livestock on the John Day River nor is there any historical record of the shipping of any supplies to farmers or homesteaders on the River. (Tr. Vol. 2, pp. 226-28.)

As settlers arrived, federal field surveyors were dispatched to survey the region. In the 1860s, the surveyors were directed to meander both sides of all navigable bodies of water. (Tr. Vol. 5, p. 72.) On those streams that were not navigable but were nevertheless used as a "primary artery of internal communication," surveyors were instructed to meander one bank only. (Tr. Vol. 2, pp. 60-61; Vol. 5, p. 78.) Despite these general instructions, the Surveyor General of Oregon did not instruct the field surveyors to meander any part of the John Day River. (Tr. Vol. 5, p. 83.)

In the late nineteenth and early twentieth century, there was also very little documented use of the John Day River. In 1889, a stern-wheel vessel named the *John Day Queen I* operated at stretches of the River not at issue in this case.⁵ The vessel was used for the owner's entertainment purposes only. (Tr. Vol. 2, p. 64; Ex. 265, p. 34.) There is no evidence that any fee was charged. (Tr. Vol. 2, p. 64; Tr. Vol. 6, p. 76.) In May of 1899 the vessel was destroyed. (Tr. Vol. 2, p. 65; Ex. 265, p. 34.) In 1904 the owner of the *John Day*

⁵ It operated between River miles 110-120 (Vol. 2, pp. 63-64.)

Queen I built a second stern-wheeler, the *John Day Queen II*. This vessel operated in the same vicinity for a brief time. In 1909, the owner attempted to move the stern-wheeler down the John Day River for eventual transport to the Willamette River. While attempting this, the vessel struck a rock and sank in four feet of water. (Ex. 265, p. 35.) Both the *John Day Queen I* and *II* were assembled from spare parts left over from mining and farming equipment that the owner had lying around his property. They were both hobby efforts and neither vessel went up and down the River carrying paid passengers or freight. (Tr. Vol. 6, p. 76.)

Although there were a few ferries that went *across* the John Day River at certain points, they simply went from one bank to the other and did not navigate up and down the River. (Tr. Vol. 2, pp. 66, 172.) While one of these ferries, the Twickenham Ferry, was relocated at one point from River mile 145 to River mile 55, individuals on the shore had to pull the vessel through rapids on the River with rope. (Tr. Vol. 2, pp. 172-73.)

There was also a newspaper account of a test log drive that was to be conducted on the John Day River in May of 1885. (Tr. Vol. 2, p. 81; Ex. 265, p. 52.) There are no newspaper accounts stating whether the test was successful. (Tr. Vol. 2, p. 177.) Similarly, there is no evidence as to where any logs were placed in the River or were they were taken out nor was there any evidence that any logs ever made it all the way downriver to the Columbia River. (Vol. 2, pp. 241-42.) No sawmill was ever built on the John Day River, nor did any local mill in the vicinity obtain a supply of logs by floating them down the John Day River. (Tr. Vol. 2, p. 258.)

Historically, government agencies have found the John Day River to be non-navigable. In 1933, the United States Army Corps of Engineers published a study of the River for the purposes of developing a general plan for navigation, flood control, irrigation and the development of waterpower.

At three points in the study, the Corps found that the River was *not* navigable in its natural state. (Ex. 265, p. 85.) In 1970, the Advisory Committee to the Oregon State Land Board compiled a list of rivers in Oregon that the State considered "navigable." That list did not include the John Day River. (Ex. 115, Ex. D.) In January 1977, the U. S. Department of the Interior wrote the Oregon Division of State Lands to inquire as to the status of riverbed ownership on the John Day River. The Oregon Division of State Lands reported that the John Day River was not considered a navigable river. (Ex. 101.)

The trial judge found that the John Day River was navigable under federal law at the stretches at issue in this case based upon his finding that it was susceptible to commercial navigation. (App., *infra*, 6a.) He based this conclusion upon modern recreational kayaking and river rafting and upon a finding that the "river was historically navigated commercially both by the indigenous Native American population and by the immigrant settlers, to at least a limited extent." (*Id.*)

The Oregon Court of Appeals affirmed the judgment of the trial court. In its decision, the Oregon Court of Appeals purported to apply *The Daniel Ball* test in finding that the John Day River was navigable at the points at issue herein. (App., *infra*, 21a.) The court found that various Native American tribes used dugout canoes "which typically drafted six to eight inches" in the Columbia River Basin for fishing, travel and trade. (App., *infra*, 28a.) Based upon this finding, the court found that, "in its ordinary condition in 1859, the John Day River as it passes through the defendants' properties would have provided ample capacity for travel and trade by means of dugout canoes." (App., *infra*, 28a.) The court also found that the River had also been used for one log run and stern-wheeler traffic. (App., *infra*, 29-30a.) However, the court found that evidence of such use merely

corroborated the River's susceptibility for navigation as demonstrated by the capacity for Native American canoe use. (App., *infra*, 29a.) The court squarely ruled that susceptibility for travel by canoes with drafts of six to eight inches was sufficient, *in and of itself*, to support a finding of navigability under *The Daniel Ball* test.⁶ (App., *infra*, 28a.)

Petitioners herein contend that the Oregon court's decision greatly expands the traditional test as enunciated by this Court in *The Daniel Ball* and substitutes for it a much less stringent test that elevates "floatability" over any significant evidence that the waterway was commonly used, or was susceptible for use, for trade and travel as a highway for commerce. Throughout the trial court proceedings, petitioners herein have contended that the John Day River was not navigable under federal law at the time of Oregon statehood and that a proper application of the federal test for navigability as set forth by this Court in *The Daniel Ball* required a finding that the John Day River was not navigable at the segments involved herein. (App., *infra*, 39-43a.) Petitioners repeated these arguments in their assignments of error and arguments to the Oregon Court of Appeals and Oregon Supreme Court. (App., *infra*, 44 to 55a.) In its opinion, the Oregon Court of Appeals specifically made note that petitioners herein each assigned as error the trial court's declaration of navigability under federal law. (App., *infra*, 13a.) Petitioners' contentions herein about the proper application of the federal law of navigability under *The Daniel Ball* test were clearly raised and ruled upon by the Oregon state courts.

⁶ The Oregon Court of Appeals did not rely to any significant degree upon current recreational uses of the river.

REASONS FOR GRANTING THE WRIT

I. THE OREGON COURT OF APPEALS DECISION CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

Stripped to its essence, the Oregon Court of Appeals decision is that any river upon which a canoe with a draft of six to eight inches can be floated at certain times of the year is a navigable waterway under federal law. The court ruled that purported Native American canoe use of the John Day River, ostensibly established by mere circumstantial evidence that canoes were used on other rivers, was *in and of itself* sufficient to demonstrate actual use for trade and travel and to thus justify a finding of navigability.⁷ (App., *infra*, 28a.)

This decision greatly expands the federal test for navigability, a test which has stood for well over one hundred years. It exposes hundreds, if not thousands, of waterways in the United States to being found navigable based on a similar capacity for "floatability" even though these waterways may never have previously been considered to be navigable. The Oregon court's decision upsets well-settled property right expectations and encourages a massive land grab by the states over the bed and banks of waterways which have historically been considered to be privately owned. The decision goes well beyond what this Court has ever decided regarding

⁷ The reference by the Oregon Court of Appeals to the capability of the stretches of the River at issue herein for stern-wheeler traffic and test log drives was mere "window dressing" that was not essential to its decision that purported Native American canoe use on the John Day River was, *in and of itself*, sufficient to demonstrate "capacity for travel and trade" under *The Daniel Ball* test. (App., *infra*, 28a.) However, the court's findings with regards to stern-wheeler traffic and log drives were in error. There was no direct evidence in the record that stern-wheelers regularly navigated or that any logs were ever floated at the stretches of the River at issue in this case. (App., *infra*, 29-30a.)

navigability and trivializes this Court's holding in *The Daniel Ball* which requires that navigable rivers be used, or be susceptible for use, as "*highways for commerce* over which trade and travel are or may be conducted in the customary modes of trade and travel on water." *The Daniel Ball*, 77 U.S. at 563 (emphasis added). Rather than requiring evidence that the John Day River was susceptible to use as a "highway for commerce," the Oregon court decided that the mere ability to float a Native American canoe in shallow water was sufficient to support a finding of navigability.

This Court's use of the term "highways for commerce" in *The Daniel Ball* case and its requirement that the waterway be useful for *both* travel *and* trade are crucial. In *The Daniel Ball*, this Court affirmed the lower court and found that the Grand River in Michigan was a highway for commerce where the facts established that "a steamer of 123 tons burden, laden with merchandise and passengers, was engaged as a common carrier on the river." *Id.* at 564. The steamer shipped goods destined for other states downriver and returned goods from these states upriver. *Id.* at 565. The Court's holding was that the mere ability to use a waterway as a means for transportation was insufficient as a matter of law to establish navigability. It *must* be useful as a highway for commerce as well.

In *The Montello*, 87 U.S. 430, 22 L. Ed. 391 (1874), the Court clarified and refined *The Daniel Ball* test. However, the Court's decision again underscored the importance of *commercial* usefulness. The Court reversed the lower court and found the Fox River in Wisconsin navigable where the "immense fur trade of the Northwest was carried over it for more than a century" and "where a large interstate commerce

has been successfully carried on through this channel.” *Id.* at 440-41.⁸ The Court further stated:

Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by agency of steam, are, or may become, the mode by which *a vast commerce can be conducted*, and it would be a mischievous rule that would exclude either in determining the navigability of a river. *It is not, however, as Chief Justice Shaw said, every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but, in order to give it the character of a navigable stream, it must be commonly useful for some purpose of trade or agriculture.*

Id. at 442 (emphasis added). Thus, the Court focused not on floatability but on the common usefulness of the waterway as one upon which “a vast commerce” can be conducted. *Id.* The waterway must therefore be one which affords “a channel for useful commerce.” *Id.* at 443.

In determining whether a waterway was “commonly useful to some purpose of trade or agriculture” since *The Montello*, this Court has given great weight to historical evidence of actual use of the waterway. The Court has *never* made a finding of navigability under the scant facts presented in this case. In cases between 1899 and 1926, the Court continuously focused on historical uses and found navigability *only* where there was substantial evidence of common usefulness for commerce. *See, e.g., United States v. Holt State Bank*, 270 U.S. 49, 57, 46 S. Ct. 197, 70 L. Ed. 465 (1926) (Mud Lake in Minnesota was navigable where merchants used the lake to transport goods and supplies); *Brewer-Elliott Oil &*

⁸ The fact that the lower court found that such substantial commercial activity did not support the river’s status as a “highway for commerce” speaks volumes about how navigability was viewed in the mid-nineteenth century.

Gas Co. v. United States, 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922) (river was not susceptible to use as a highway for commerce despite evidence of occasional use and log drives); *Oklahoma v. Texas*, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922) (river was not navigable where small boats transported merchandise and farm products only at high water and with difficulty); *Economy Light & Power Co. v. United States*, 256 U.S. 113, 118, 41 S. Ct. 409, 65 L. Ed. 847 (1921) (river was navigable due to extensive history of fur trade, transport of large amounts of supplies for early settlers, and use of boats that could carry several tons); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698, 19 S. Ct. 770, 43 L. Ed. 1136 (1899) (the "mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river").

In more recent cases, this Court has adhered to the requirement that the waterway be susceptible to common use as a highway for commerce. Thus, in *United States v. Utah*, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931), the Court found portions of the rivers at issue navigable where they had been used by "a large number of enterprises, with boats of various sorts, including rowboats, flatboats, steamboats, motor-boats, a barge and scows, some being used for exploration, some for pleasure, some to carry passengers and supplies, and others in connection with prospecting, surveying and mining operations." *Id.* at 82. The Court further stated that, where conditions of exploration and settlement explained the infrequency or limited nature of commercial uses, "the susceptibility to use as a highway of commerce may still be satisfactorily proven." *Id.* However, nothing in the Court's opinion supports the notion that the mere ability of a canoe to float a river would establish the general usefulness of the river as a highway for commerce. See also *United States v. Oregon*, 295 U.S. 1, 22-23, 55 S. Ct. 610, 79 L. Ed. 1267 (1935) (holding that certain Oregon waterways were not navigable where there was no significant evidence of

transportation of any commodity and where the disputed waterways had been treated as nonnavigable by both the United States Secretary of the Interior and the Oregon courts).

The most recent case from this Court on navigability for title is *Utah v. United States*, 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971), in which the Court held that the Great Salt Lake was susceptible to navigation at the time of Utah statehood. This holding was based upon evidence that boats had been used by ranchers to haul cattle and sheep to and from islands in the lake and to haul ore, salt and cedar posts; that another boat hauled salt from various saltworks to a railroad connection; and that a boat at one time had plied the waters of the lake hauling freight and passengers. *Id.* at 11-12. The Court also relied upon the fact that at the time of statehood the lake was 30 feet deep and was capable of affording passage to large boats, barges and similar crafts in general use in inland navigable waters in the United States. *Id.* at 12.

The Court's focus in all of these cases has been the common usefulness of the waterway as a "highway for commerce." The term "highway for commerce" would not have been used by the Court had it meant that any waterway upon which a Native American canoe could be floated was navigable. The use of the term "highway for commerce" clearly implies that the waterway must be useful as a trade route in modes of trade on water that were customary at the time of statehood.

The Oregon Court of Appeals decision is not based upon any evidence that the John Day River was *ever* used for significant commercial purposes at the stretches involved in this case or that it was even useful for such purposes. Although it is conceivable that a Native American canoe with a draft of six to eight *inches* could carry *small* items such as shells and dried salmon that could be traded, a finding of navigability based upon such a conceivable use would

transform hundreds, if not thousands of rivers and waterways throughout the nation into navigable waterways. In addition, a holding that the transport of such small items in a dugout canoe constitutes "trade" or "commerce" as those terms were used in *The Daniel Ball* means that, in essence, susceptibility to "travel" is the lone requirement for navigability and that the companion requirement of "trade" has been eliminated. *The Daniel Ball*, 77 U.S. at 563. Since small items that might theoretically be traded could presumably fit into the bottom of a canoe along with its human inhabitant, the requirement of susceptibility for trade is therefore subsumed by the travel requirement. Therefore, all that the Oregon court requires for a finding of navigability is that the river at issue be floatable. This is not consistent with this Court's holding in *The Daniel Ball* or with subsequent decisions of this Court. The Oregon court's decision upsets the well-established expectations of riparian property owners on the John Day River and, as precedent, will similarly call into question the settled expectations of property owners along countless waterways throughout the country.

The Oregon Court of Appeals' lax standard for establishing navigability goes well beyond this Court's prior decisions regarding the federal test for navigability. The bottom line is that the Oregon court has altered this Court's "highway for commerce" test beyond recognition. A finding of navigability is now possible whenever even the smallest watercraft can float on a shallow waterway even if there is no evidence that it was ever used, or is commonly useful, for commercial purposes. This Court has *never* found navigability for title based on the negligible evidence of commercial use, or susceptibility for commercial use, present herein.

II. THIS CASE HAS SIGNIFICANT RAMIFICATIONS BEYOND THE JOHN DAY RIVER.

This case poses a classic conflict between the interests of private landowners who are trying to protect their ownership interests in the beds and banks of waterways historically considered to be nonnavigable and the interests of the states and recreational enthusiasts who seek inexpensive recreational opportunities through an unprecedented and expansive interpretation of this Court's decisions regarding navigability. Many of the private landowners along the John Day River trace their title back to federal land patents. (Exs. 122, 123.) The deeds to their property grant title to the bed and banks of the River. (*Id.*) Some of these landowners have paid property taxes to local authorities based on their "ownership" of the submerged and submersible lands. (Tr. Vol. 7, p. 88.) Along with that burden come the attributes of ownership, the right to exclude others and to make profitable uses of their property. For many years, both federal and state authorities expressly represented that the John Day River was non-navigable, establishing the well-settled expectations of riparian owners regarding the extent of their property rights. Against these interests are the interests of members of the public who wish to float, fish and camp on what for almost 150 years has been considered private property.

However, these conflicts are not limited to the bed and banks of the John Day River. In the state of Oregon alone, thousands of individuals and businesses own properties bordering numerous streams, rivers, lakes and other bodies of water in the state that have traditionally been considered nonnavigable under *The Daniel Ball* test. To the extent that any of these bodies of water could have been floated by a Native American dugout canoe with six to eight inches of draft, they may now be vulnerable to a navigability finding based on the Oregon Court of Appeals decision herein. Since this case, requests for navigability determinations have been

submitted for approximately six other rivers in Oregon alone, rivers which have not previously been deemed navigable. (App., *infra*, 58a.)

These important issues do not disappear at Oregon's borders. Similar disputes have arisen in recent years in numerous other states where a greatly expanded test of navigability such as was applied by the Oregon Court of Appeals could lead to thousands of waterways being deemed navigable. See, e.g., *Parks v. Cooper*, 676 N.W. 2d 823 (S.D. 2004); *Walker Lands, Inc. v. East Carroll Parish Police Jury*, 871 So. 2d 1258 (La. 2004); *Arkansas River Rights Committee v. Echubby Lake Hunting Club*, 126 S.W.3d 738 (Ark 2003). The property rights of countless individuals and businesses would be diminished at the same time that the rights of recreational enthusiasts seeking to use the waterways would be correspondingly increased.

The Oregon court's decision is an open invitation to the states, many of which are suffering from fiscal problems, to bypass paying just compensation to landowners when they seek to obtain land for parks and recreational areas and to instead invoke an expanded notion of "navigability" to obtain the areas they seek. However, the test for navigability is uniquely one of federal law and this Court should decide the important federal issues posed by this state court case.

The Oregon court's decision also will likely be used in states like Alaska where there has been a long simmering dispute between the federal and state governments over the scope of the navigability doctrine, with the state taking an expansive view and the federal government taking a much narrower view in line with the principles set forth by this Court in *The Daniel Ball*. See, e.g., Alaska State Policy on Navigability (App., *infra*, 64-65a). The federal government has asserted, like petitioners here, that susceptibility for commercial transportation is required. (App. *infra*, 69a).

This Court has defined through its opinions over the last 135 years the scope of the federal "navigability for title" test. However, the Court last addressed "navigability for title" in any significant way some thirty-five years ago in *Utah v. United States*, 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971), in which the Great Salt Lake was found to be navigable. Since that time, the pursuits of recreational users have increased dramatically. They have organized into groups (such as the respondent Northwest Steelheaders Association) and have attempted, through use of the judicial process, to increase access to previously inaccessible waterways in derogation of the private property interests of landowners along the nation's waterways. The conflicts evident in this case will surely continue throughout the nation as advocates of property rights and advocates for recreational users who wish to use waterways that have traditionally been considered in private ownership continue to clash.

This case poses numerous legal issues which this Court should address that will offer guidance to both federal and state courts throughout the nation as they work to apply the core principles of the *The Daniel Ball*: that a waterway must be susceptible to *both* trade and travel and must be *commonly useful* as a highway for commerce. Issues concerning (1) the weight to be given to Native American use (where, unlike here, there is *actual* evidence of such use) which does not rise to the level of commercial use; (2) the significance, if any, of modern recreational uses to determine if the waterway was susceptible to useful commerce using customary modes of trade and travel at the time of statehood; (3) the effect to be given to prior pronouncements by state and federal agencies that the waterway was not navigable; and (4) the effect to be given to patents and deeds granting title to the middle of the waterway at a time when the River was not considered navigable are all issues that will recur with regards to other navigability determinations throughout the United States. This Court should grant certiorari to resolve these and other

questions regarding the federal navigability test and, *most importantly*, to make it clear that the mere fact that a waterway is "floatable" does not make it a "highway for commerce" as that phrase has been used in *The Daniel Ball* and subsequent decisions of this Court.

CONCLUSION

For the above reasons, the petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL T. GARONE *
DAVID F. BARTZ, JR.
SCHWABE, WILLIAMSON
& WYATT, P.C.
1211 SW Fifth Ave., Suites 1600-1900
Portland, OR 97204-3795
(503) 222-9981

GORDON HANNA
GORDON HANNA PC
242 Church Street SE
Salem, OR 97301
(503) 585-3408

* Counsel of Record

Counsel for Petitioners

APPENDICES

APPENDIX A

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION**

[Filed Jun 14, 2002]

Case No. 99C-12309

NORTHWEST STEELHEADERS ASSOCIATION, INC.,
an Oregon nonprofit corporation and Petitioner;
RAYMOND D. DEZELLEM; and RICHARD "RICK" ALLEN,
Plaintiffs,

v.

DAVID SIMANTEL and TAMMY SIMANTEL, husband and wife,
STATE OF OREGON, by and through the Oregon State Land
Board; DAVID K. SCHLECHT, and SARAH J. SCHLECHT, and
MIANI, WILLIAMSON & EVANS,

Defendants,

and

ROBERT JON GROVER,
Defendant/Intervenor.

JUDGMENT

THIS MATTER came on regularly for trial on February 11, 2002 before the Honorable Paul Lipscomb on claims by plaintiff Northwest Steelheaders Association, Inc. against defendant State of Oregon, and before a jury sitting in an advisory capacity on the factual issues raised by plaintiffs Dezelle and Allen's claims pertaining to the navigability of certain portions of the John Day River. Plaintiffs appeared by and through their counsel, Thane W. Tienison; defendant State of Oregon appeared by and through its counsel, William Cloran; defendants Simantel, Schlecht, and Miani, Williamson & Evans appeared by and through their counsel, Gordon

Hanna; and defendant/intervenor Grover appeared by and through his counsel, David Bartz.

Counsel made opening statements, introduced testimony and other evidence with regard their respective claims and defenses, and the parties rested.

Arguments were then made to the jury in behalf of the respective parties and the advisory Jury, having been instructed on all matters of law and having retired to deliberate on its verdict on February 21, 2002, returned into Court an advisory verdict in favor of plaintiffs Dezelle and Allen on February 22, 2002, which, omitting the title of the Court and cause and questions pertaining to the counterclaims asserted by the defendants, was in the following form:

"WE, THE JURY, being duly empaneled, return our verdict as follows:

- "1. Is the John Day River navigable in fact at the property owned by Miani, Williamson and Evans?

"X yes — no

- "5. Is the John Day River navigable in fact at the property owned by David and Tammy Simantel and David and Sarah Schlect?

"X yes — no

* * * *

"Dated this 22nd day of February, 2002.

"S. Susayne Fisher
"Jury Foreperson"

Thereafter, the Court, having considered the advisory verdict and the issues having being duly tried, issued an Opinion and Order dated March 13, 2002 (a copy of which is

attached hereto as Exhibit "A" and incorporated herein by reference), and the Court further finds:

Mary Anderson and Steven Anderson own property abutting the John Day River as follows:

"Township 2N, Range 19E, Section 29, Tax Lot Unknown, Gilliam County."

Mary Anderson and Steven Anderson were former defendants in this action and were parties to a Stipulated Judgment of Dismissal With Prejudice and Without Costs entered pursuant to ORCP 57B filed on July 31, 2001, and entered on August 2, 2001. Pursuant to that Stipulated Judgment of Dismissal, Mary Anderson and Steven Anderson agreed not to contest plaintiffs' [aims regarding the navigability of the John Day River, in this case or otherwise, as it applied to the real property owned by them, provided that plaintiffs would not pursue any claims for attorney fees or other costs and disbursements against Mary Anderson and Steven Anderson and could dismiss their claims against Mary Anderson and Steven Anderson with prejudice and without costs, disbursements and/or attorney fees of any kind.

BASED ON THE FOREGOING, the Court hereby makes and enters the following:

JUDGMENT

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED that plaintiff Dezellem have, take, and recover a judgment against defendants David and Tammy Simantel on their counterclaim against him for his costs and disbursements incurred herein taxed in the sum of \$500.00 and that plaintiff Allen have, take, and recover a judgment against defendant Miani, Williamson & Evans on its counterclaim against him for his costs and disbursements incurred herein taxed in the sum of \$500.00.

IT IS FURTHER ORDERED AND. ADJUDGED that title to all lands lying below the ordinary high water mark of the John Day River is vested in the defendant State of Oregon, in Trust for the Citizens of the State of Oregon, as the River passes the following described real property:

“Township 1N, Range 19E, Section 3, Tax Lot 500, Gilliam County (Simantel);

“Township 2N, Range 19E, Section 33, Tax Lot 1904, Gilliam County (Simantel);

“Township 1N, Range 19E, Sections 3, 2 and 11, Tax Lots 100-200, and Section 14, Tax Lot 2500, Sherman County (Schlect);

“Township 2N, Range 19E, Sections 29, Tax Lot Unknown, Gilliam County (Anderson); and

“Township 9S, Range 20E, Tax Lot 4400, Wheeler County (Miani, Williamson & Evans).”

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff Northwest Steelheaders Association, Inc. have, take, and recover a judgment against defendant State of Oregon for its costs and disbursements incurred herein taxed in the amount of \$872.00.

DATED this 14th day of June 2002.

/s/ Paul J. Lipscomb
The Hon. Paul J. Lipscomb
Circuit Court Judge

Submitted by:
Thane W. Tienson, OSB #77374
LANDYE BENNETT BLUMSTEIN LLP
Of Attorneys for Plaintiffs

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

Case No. 99C12309

NORTHWEST STEELHEADERS ASSOCIATION, INC., an Oregon
nonprofit corporation and RAYMOND D. DEZELLEM;
and RICHARD "RICK" ALLEN,
Plaintiffs,

v.

DAVID SIMANTEL and TAMMY SIMANTEL, husband and wife,
STATE OF OREGON by and through the Oregon State Land
Board; DAVID K. SCHLECHT and SARAH J. SCHLECHT, and
MIANI, WILLIAMSON & EVANS;

Defendants,

and

ROBERT JON GROVER,

Intervenor.

OPINION AND ORDER

This case is before the court for a declaratory judgment following a trial on the merits and the receipt of the verdict of the jury. I have now had an opportunity to review the balance of the documentary evidence in this case and to look at the tape of the prior proceedings (Ex 51).

The jury was impaneled in a dual capacity: first, as the trier of fact on the counterclaim for trespass; and second, as an advisory jury to the court on the factual issues raised by plaintiffs' case in chief. The jury's decision is binding on the trespass issues. It is not binding on the other issues, but it was apparent to me that the jury worked very hard and thoughtfully considered the facts on both sides of the case.

Navigability in Fact for Title

My own finding is the same as the jury's on the navigability Issue. The John Day River was navigable in fact at the time Oregon was admitted to the Union, at least as to the two specific locations involved in this lawsuit: the defendants' respective properties at or about both Burnt Ranch and McDonald Crossing. In addition to my consideration of the jury's verdict, my reasons for that decision are essentially as follows.

First, even in its current condition, the John Day river is susceptible to commercial navigation during most months of the year. Indeed, it is actually navigated by hundreds of recreational tourists and commercial outfitters throughout much of each year, albeit most of the commercial activity appears to take place during the months of May, June and early July.

Second, I find that the river was historically navigated commercially both by the indigenous Native American population and by the immigrant settlers, at least to a limited extent. Such uses included canoes and small boats appropriate to that period. Later two small scale timber drives were also made in preparation for a large scale timber operation by the Chee Lumber Co. that had been planned to commence at the time of the Great Depression. A few other occasional commercial uses were documented by plaintiffs' expert witnesses at trial.

Third, I find that past mining and livestock grazing practices have degraded the channel of the river and that agricultural irrigation activities have substantially reduced the volume of water flowing in the channel. Those practices began shortly after Statehood and altered the river from its natural state. Currently, during the summer irrigation season roughly 300 cubic feet per second of the river's normal volume is withdrawn before it gets to Service Creek; well

upstream of the locations of importance to this case. Additional irrigation withdrawals continue on down the river. If the irrigation water were allowed to remain in the river, the evidence indicated that the flow rates in July, August and September would be substantially higher, often well more than double current flows. Commercial navigation would then be convenient consistently throughout the year. Had the river been permitted to remain in its natural state it is also likely that more commercial navigation would have taken place years ago as the area was gradually settled.

Accordingly, I find from all the evidence that in its natural condition at the time of Statehood, the John Day River was susceptible to commercial navigation.

In reaching this conclusion I found the testimony of plaintiffs' experts credible and helpful, particularly Dr. Beckham and Dr. Shelby, as well as the written BLM studies. I further found that defendants' expert, Dr. Ficken, was not credible and was not helpful. Finally, I found that the evidence regarding the unusually high rainfall amounts at the time of statehood was credible, but not helpful. I don't believe that unusually wet (or unusually dry) periods are material to the determination of whether the river was navigable in its natural and *ordinary* condition.

The Floatage Easement Issue

The parties have agreed that there is a floatage easement on the John Day River, but disagree as to its scope. While the finding of navigability for title largely moots most issues relative to the floatage easement, the parties are still entitled to a declaration as to the legal extent of that easement as it may pertain to these parties both now and in the future. Although there are substantial similarities between these two issues, there remain significant differences.

Navigability for title determines actual title to the bed and banks of the river. A finding of susceptibility to commercial

navigability establishes public ownership of the land below the ordinary high water mark for all purposes, regardless of whether those activities are related to use of the river for travel by boat. Navigability for title is controlled by federal law.

In contrast, a floatage easement extends only to uses or activities incidental to water travel. Such water related uses however, are not necessarily confined to riparian lands below the ordinary high water mark.. The nature and extent of the floatage easement is determined by state common law.

The floatage easement is a creature of legal and practical necessity. Through that legal doctrine the boating public has traditionally enjoyed priority over the riparian landowners to the extent, but only to the extent, that the boaters' Incidental activities on those riparian lands are reasonably necessary to the convenient use of the waterway for travel. Basically those customary uses of the boating public which are reasonably necessary to the convenient use of the river as a waterway are permitted. But those uses which are not necessary to convenient travel on the river are not permitted. See *Weise v. Smith*, 3 Or 445 (1869). See also *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1912); *Adirondak League Club, Inc. v. Sierra Club*, N.Y.S. 2d 168 (Ct. App.1998); *Montana Coalition for Stream Access, Inc. v. Hildreth*, 684 P2d 1088 (Montana 1984); *Southern Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P2d 1295 (Idaho 1974).

Permitted uses therefore would include scouting and portaging rapids, anchoring, mooring, poling, wading, and beaching for periods of rest. In contrast, because of the prevalence of public lands at least along this river, overnight camping on the private riparian uplands would not normally be necessary and so would not be permitted pursuant to the floatage easement. Nor, would the floatage easement allow hunting, fishing, wood gathering or other foraging activities on the private uplands regardless of whether those activities were

connected with the use of the waterway by boating. (Of course, different rules would apply below the ordinary high water mark in those portions of the river which are navigable for title purposes.)

By law the John Day River has been designated as both a State and Federal Scenic Waterway. A waterway, like a terrestrial highway, is intended to be used for public travel. Defendants and Intervenor have expressed legitimate concerns about both potential and actual litter and vandalism problems. However such problems commonly occur along highways as well as waterways. Their existence does not constrain the right of public usage, but rather indicates a need for better public education, regulation, and enforcement.

Plaintiff's Claims Against the State of Oregon

Plaintiff Northwest Steelheaders Association, Inc., submitted a navigability study request to the Oregon Division of State Lands in February of 1997, in accordance with 274.404 and OAR 141.121.0020. The Oregon Division of State Lands, in turn, referred the Steelheaders' request to the Oregon State Land Board without recommendation. However, the State Land Board has not acted on that navigability study request despite the passage of several years.

At this juncture the State Land board has discretion either to order the Division of State Lands to conduct a study or to reject the request. The Board may even direct the Division to postpone undertaking the study. Accordingly, the State Land Board has very broad authority under the statute to direct the Division however it determines to be best. The State Land Board does not, however, have discretion simply to do nothing at all.

ORS 183.490 provides that an agency may be compelled to act by this court where it has "unreasonably delayed taking action or making a decision." The parties hereto have stipulated that "the Oregon State Land Board has not acted on the

navigability study request referred to it by the Oregon Division of State Lands, in part because the Oregon State Land Board has identified other river segments in Oregon as having greater priority for study purposes than the John Day River and, in part, because of the pendency of the litigation in which this Stipulation is entered.”

None of the reasons identified is legally sufficient for prolonged delay. The final judgment in this case will not ultimately determine navigability of the entire John Day River, merely that portion of the river which passes defendants’ properties. Moreover, the relative priority of other Oregon river segments may be reason to direct the Division to postpone the study, or even to deny the request, but it is not a reason for the Board to do nothing at all. Having made a qualifying request, the Steelheaders are entitled to a decision by the Board on their request. If the steelheaders are thereafter dissatisfied with the agency’s action they have a right to judicial review of the agency’s decision. *See* ORS 183.310 to 183.550. The agency cannot insulate itself from the judicial review provided by statute simply by refusing to act at all.

This Court finds that the Board has “unreasonably delayed” taking any action on plaintiff Steelheaders’s request for a navigability study. Accordingly, the Court hereby orders the State Land Board to forthwith exercise its discretion, one way or another, under ORS 274.404.

Counsel for plaintiff may prepare a judgment in accordance herewith. Any party requesting further findings of fact may submit proposed findings for the court’s consideration within 14 days.

Dated this ____ day of March, 2002.

Paul J. Lipscomb
Presiding Judge

APPENDIX B

**IN THE COURT OF APPEALS OF THE
STATE OF OREGON**

[Filed May 11, 2005]

99C12309; A118737

NORTHWEST STEELHEADERS ASSOCIATION, INC., an
Oregon nonprofit corporation; RAYMOND D. DEZELLEM;
and RICHARD "RICK" ALLEN,
Respondents,

v.

DAVID SIMANTEL, TAMMY SIMANTEL, and
WILLIAM WYATT, *et al,*
Defendants,

and

DAVID SCHLECHT, SARAH SCHLECHT, and
MIANI, WILLIAMSON & EVANS,
Appellants,

and

STATE OF OREGON, by and through the
Oregon State Land Board,
Respondent,

and

ROBERT JON GROVER,
Intervenor-Appellant.

Appeal from Circuit Court, Marion County.

Paul J. Lipscomb, Judge,

Argued and submitted December 20, 2004.

Gordon R. Hanna argued the cause and filed the briefs for appellants.

Michael T. Garone, argued the cause and filed the briefs for intervenor-appellant. With him on the briefs were David F. Bartz, Jr., Carson D. Bowler, and Schwabe, Williamson & Wyatt, P.C.

Melissa Powers argued the cause and filed the brief for respondents Northwest Steelheaders Association, Inc., Raymond D. Dezellem, and Richard "Rick" Allen.

Denise Fjordbeck, Assistant Attorney General, argued the cause for respondent State of Oregon. With her on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before Haselton, Presiding Judge, and Ortega, Judge, and Deits, Judge pro tempore.

HASELTON, P. J.

Affirmed.

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondents

☐ No costs allowed.

☒ Costs allowed as to respondents Northwest Steelheaders Assn., Inc., Raymond Dezellem, and Richard Allen payable by: Appellants and Intervenor-Appellant.

☐ Costs allowed, to abide the outcome on remand, payable by:

HASELTON, P.J.

Defendants¹ and intervenor appeal from a judgment that (1) declares that title to certain lands lying below the ordinary high water mark of the John Day River is held by the State of Oregon; and (2) rejects defendants' counterclaims for trespass. Defendants assign error to the denial of their motions to dismiss and for directed verdicts and to the trial court's determination that the segments of the river at issue are navigable under federal law for purposes of establishing title. Intervenor assigns error, *inter alia*, to the trial court's declaration of navigability. On the merits of the navigability question, we agree with the trial court that the segments of the John Day River at issue here were navigable at the time of statehood and, therefore, title to those segments passed to the State of Oregon at statehood. We also reject defendants' and intervenor's other assignments of error, as more fully discussed below. Accordingly, we affirm.

As discussed below, *see* __ Or App at __ (slip op at 17-20, 23-25), the parties dispute the evidence, and the significance of evidence, regarding the historical use of the John Day River. However, the following facts are undisputed: The John

¹ Defendants include David and Tammy Simantel, David and Sarah Schlecht, and Miani, Williamson & Evans (hereafter "the Miani defendants")—all of whom own property along the John Day River—and, nominally, the State of Oregon. Robert Grover, who owns riverside property along the John Day in Gilliam and Sherman counties, intervened on the side of defendants, opposing the declaration of navigability and advocating in favor of the Simantel and Miani defendants' trespass counterclaims against plaintiffs Raymond Dezellem and Richard Allen, respectively.

The Simantels have not appealed. Nor has the state, but the state has presented briefing and arguments in support of the judgment below. Because the state has not appealed, and because its interests and arguments diverge significantly from those of intervenor Grover and the other defendants, references to "defendants" in this opinion are only to the Schlechts and the Miani defendants.

Day River cuts a 280-mile path through the northern plateau of central Oregon. The John Day is the longest river in Oregon that runs entirely within the state, and it drains the fourth largest watershed in the state. The river's mean annual flow for the period of record is 1,959 cubic feet per second ("cfs"), as measured at Service Creek, approximately 20 river Miles upriver from the most upriver segment at issue here. Stream flows are generally highest in April, averaging over 5,000 cfs, and lowest in late summer, dipping to an average of 185 cfs in September, when diversions from the upper basin claim significant volumes for irrigation.² Such diversions, in addition to those for mining and other uses, began with the discovery of gold in the upper John Day River basin in 1862. Before that time, stream flows during some summer months were almost double their current volume.

In 1898, the United States granted a federal patent to the predecessors in interest of the Miani defendants. That patent purported to transfer title to all land within a metes and bounds description that spanned the course of the John Day River at approximately River Miles 133 to 135. In 1906, the federal government similarly, conveyed title to land in the vicinity of River Miles 18 to 33 to the Simantels' predecessors in interest. The current warranty deed to the Simantel property states that it conveys certain land lying "north * * * [and] [e]ast of the John Day River." All of the deeds held by defendants today contain language subjecting their titles to the "rights of the public and of government bodies." The parties stipulated at trial that a title officer would testify that nothing in the deeds or chain of title for the Schlecht, Simantel, or Miani defendants' properties grants use, occu-

² Due to the vagaries of precipitation and runoff, actual daily stream flow varies throughout the year. Statistical analysis of stream flow data over the period of record (1929-1999) indicates that the flow at Service Creek can be expected to exceed 300 cfs approximately nine months of the year.

pancy, or ownership rights to plaintiffs Dezellem or Allen, members of the public, or the State of Oregon and that, the rights of the public and the state of Oregon arise because the John Day River was navigable in fact in 1859, that fact would not appear in the title documents.”

This action—raising the question of whether, in certain locations, the bed and banks of the John Day River are privately or publicly owned—was precipitated by an incident of alleged trespass. In September 1998, plaintiff Dezellem was cited for criminal trespass while fishing from the east bank of the John Day River at approximately River Mile 21, where the Simantels’ property is located³ and across the river from the Schlechts’ property. Although the criminal trespass charge was subsequently dismissed, in March 1999, Dezellem and Northwest Steelheaders filed this action seeking (1) a declaration of navigability and state ownership of the bed and banks of certain segments of the river and (2) an injunction barring defendants from excluding plaintiffs or other members of the public from using the waterway, bed, and banks of the river in those same locations.⁴ The Simantels asserted a counterclaim against Dezellem, in which they alleged that he had trespassed on their property while fishing from the bank of the river.

In June 2000, plaintiff Allen was threatened with prosecution for criminal trespass by an agent of the Miani defendants, as he fished from a sandbar in the middle of the John Day at approximately River Miles 133-135, where the Miani

³ The facts pertaining to the trespass counterclaims, which arise from two separate incidents in 1998 and 2000, are set out in greater detail below. __ Or App at __ (slip op at 4-6).

⁴ Plaintiffs also sought, and received, both a declaration that the John Day River is subject to the public floatation easement under state law and an injunction ordering the State of Oregon to act on Northwest Steelheaders’ request for a navigability study of the entire length of the river. No party challenges those rulings.

defendants own property known as the Burnt Ranch. Thereafter, Allen joined this action as an additional plaintiff, and the Miani defendants were joined as additional defendants. For their part, the Miani defendants alleged a trespass counterclaim against Allen. Ultimately, as alleged in the operative fifth amended complaint, plaintiffs sought a declaration that “the John Day. River, as it passes the real property owned by the individual defendants, is navigable.”

The case was tried in February 2002. Given the nature of the claims and counterclaims, the trial court empaneled a jury in a dual capacity—first, as trier of fact on the trespass counterclaims, and second, as an advisory jury with respect to “factual issues raised by plaintiffs[’] * * * claims pertaining to the navigability” of the river.⁵ The jury returned a verdict that plaintiffs Dezelle and Allen were not liable for trespass, and, in its advisory capacity, the jury rendered a finding that the John Day River is navigable in fact at the disputed locations.

After an independent review of the evidence and arguments, the trial court issued an opinion determining that the John Day River is navigable in the disputed locations. The trial court subsequently entered judgment against the Simantels and the Miani defendants on their trespass counterclaims and declared that, as a result of its navigability determination, title to lands lying below the ordinary high water mark of the river at the relevant locations had vested in the State of Oregon at the time of statehood.

On appeal, the parties reiterate the arguments made to the trial court. At the outset, we address a threshold matter that pertains only to the Schlechts. Before the trial court, the Schlechts moved to dismiss all claims against them, alleging

⁵ As explained more fully below, __ Or App at __ (slip op at 8), the determination of “title navigability” for purposes of declaratory and injunctive relief is a matter committed to the court.

a lack of a justiciable controversy. They asserted that because they were not involved in the trespass incident that gave rise to this case, any adjudication as to them would implicate only "hypothetical questions that may never arise." The Schlechts later renewed those arguments by way of a motion for a directed verdict, arguing that any declaration would be purely advisory as to them and their property "because [there are] no facts in dispute that affect[] them." The trial court denied both motions. On appeal, the Schlechts assign error to those rulings.

As relevant to those assignments of error, testimony at trial established the following facts: The Schlechts and Simantels own property on opposite sides of the John Day River near McDonald's Crossing at River Mile 21 (*i.e.*, approximately 21 miles upstream from the mouth of the John Day). The Schlecht property is on the west (Sherman County) side of the river, while the Simantel property is on the east (Gilliam County) side of the river. Both properties were managed by defendant David Simantel, who lived in a house on the Schlecht property and who collected fees for access to the entire area. On September 26, 1998, plaintiff Dezellem, who had entered the area via land owned by the federal Bureau of Land Management, was fishing from the east bank of the river in the vicinity of the Simantel property and opposite the Schlecht property. David Simantel approached Dezellem and told him that the whole area was private property and that he would have to leave. When Dezellem refused to do so, Simantel contacted the local sheriff, who issued Dezellem a citation for criminal trespass. That citation was subsequently dismissed.

On appeal, the Schlechts contend that "there is no allegation nor proof of any justiciable controversy" between any plaintiff and themselves because (1) Dezellem was excluded from the Simantels' property, not the Schlechts; and (2) neither David nor Sarah Schlecht directed Simantel to exclude

Dezellem. That is, it was Simantel, and not the Schlechts, who took action to exclude Dezellem from the Simantels' side of the river. Thus, the Schlechts contend, any declaration would be merely, and impermissibly, advisory as to them and their property.

ORS 28.110 requires that, in an action seeking declaratory judgment, all persons be joined as parties "who have or claim any interest which would be affected by the declaration." That requirement is jurisdictional. *See Stanley, Adm. v. Mueller*, 211 Or 198, 207, 315 152d 125 (1957) (no justiciable controversy exists unless all persons who may have an interest in the outcome have been joined); *Vance v. Ford*, 187 Or App 412, 424-25, 67 Pad 412 (2003) (same).

Here, the Schlechts' asserted interest—viz., ownership of the land between the ordinary high water mark on the east bank of the John Day to the midpoint of the channel—"would be affected by" the declaratory relief sought. Plaintiffs sought a declaration that the John Day is navigable "as it passes the real property owned by the individual defendants" for purposes of title navigability, confirming that the state—and not the adjacent property owners—holds title to the bed and banks at those points.

Nevertheless, at oral argument, the Schlechts contended that any declaration could determine property rights only from the ordinary high water line on the Simantel (east) side of the river to the middle of the channel. But that argument misconstrues the nature of a declaration of navigability; by definition, such a declaration encompasses the entire width of a river bed and banks, from ordinary high water mark to ordinary high water mark. *See Micelli v. Andrus*, 61 Or 78, 84, 120 P 737 (1912) ("[T]he right of a state to the beds of navigable rivers * * * extend to the lines of ordinary high water from bank to bank."). Thus, the trial court properly

denied the Schlechts' motions to dismiss and for a directed verdict.⁶

We turn, then, to the core of this case, the trial court's declaration of navigability for purposes of determining title to the bed and banks of the John Day River as that river passes the defendants' properties.⁷ We review an appeal from a judgment declaring real property rights *de novo*. ORS 19.415(3) (2001); *Merit v. Losey*, 194 Or 89, 102-03, 240 P2d 933 (1952); *Division of State Lands v. Norris*, 182 Or App 547, 553, 50 P3d 595 (2002); *McIntyre v. Photinos*, 175 Or App 478, 482, 28 P3d 1259 (2001). On *de novo* review, we examine the record independently, although we give "great weight" to the trial court's credibility determinations and to those factual findings that turn on witness credibility. *Hanson and Hanson*, 192 Or App 422, 431, 86 P3d 94, *modified on recons*, 193 Or App 246, *rev den*, 337 Or 182 (2004); *Walker v. Roberds*, 182 Or App 121, 128, 47 P3d 911 (2002).⁸

⁶ The Schlechts' position, if adopted, would lead to the incongruous result in this case of the state holding title to half of the river's channel, while the other half remained in private possession. That result could not be reconciled with the primary purpose of the sovereign's assertion, of title to navigable waterways—protection and preservation of the public's interest in free passage. *Shively v. Bowlby*, 152 US 1, 57, 14 S Ct 548, 38 L Ed 331 (1894); *Pollard's Lessee v. Hagan*, 44 US (3 How) 212, 11 L Ed 565 (1845).

⁷ As noted above, the Simantels and Schlechts each own property at approximately River Mile 21, near McDonald Crossing. The Miani defendants own property at approximately River Mile 135, also known as Burnt Ranch.

⁸ Plaintiff Northwest Steelheaders urges us to view the trial court's navigability determination as a "federal question" that is "essentially factual" and, therefore, appropriately reviewed under the "clear error" standard employed by the federal courts in such cases. None of the cases cited, however, directly addresses whether that standard is applicable to title navigability determinations in state courts. *E.g.*, *Zivkovic v. Southern California Edison Co.*, 302 F3d 1080, 1088 (9th Cir 2002) (applying

In *Land Bd. v. Corvallis Sand & Gravel Co.*, 283 Or 147, 151, 582 P2d 1352 (1978), the Oregon Supreme Court described the history and significance of the concept of navigability for purposes of determining title to certain riverbed lands:

"The original states, by virtue of their sovereignty, succeeded to title held by the English crown to the beds of the navigable waters within their boundaries. When additional states were admitted to the union, they were admitted on an equal footing with the original states and, therefore, they also acquired title to the beds of their navigable waters except any portions which had passed' into private ownership prior to statehood. While the land out of which the new states were formed was held by the federal government, that government had the power to alienate the Title to the beds of navigable waters, but it was never the general policy of the' federal government to do so as part of its disposition of the public lands. Therefore, a pre-statehood federal patent which de-

"clear error" review to trial court's determination of reasonableness of accommodation under Americans With Disability Act, 42 USC chapter 126); *Boone v. United States*, 944 F2d 1489, 1496 (9th Cir 1991) (applying "clear error" review to determination of scope of federal navigation servitude).

At oral argument, Northwest Steelheaders acknowledged that, as a state court, we are entitled to employ our own, rather than a federal, standard of review when deciding questions of federal law, unless doing so would necessarily lead to a different substantive outcome than would otherwise be reached in a federal court. *Accord Bush v. Paragon Property, Inc.*, 165 Or App 700, 706, 997 P2d 882 (2000) (suggesting that a state's "normal judicial procedures" are to be applied unless application of state procedures would "absolutely defeat" the purpose of the federal law).

In this case, adherence to *de novo* review has no such effect. Whether we review the evidence *de novo*, rendering our own factual findings, or defer to the trial court's factual findings, the John Day River is navigable at the disputed locations for purposes of establishing title.

scribes the land conveyed as running to or bounded by a navigable body of water will be construed as conveying title only as far as the high water mark. The land below high water mark, except such portions as may have been conveyed by a properly authorized grant clearly expressing that intention, was retained by the federal government in trust for the future states and passed to them upon admission to statehood. The federal government, therefore, had no power to convey it by a post-statehood patent."

(Footnotes omitted). Lands lying below the ordinary high water mark of navigable rivers are, thus, generally owned by the state and are considered to have been so held since the admission of that state to the Union.⁹ The question of whether a given river segment is navigable for purposes of determining title under the "equal footing" doctrine is one of federal law. *Id.* at 152 (citing *Barney v. Keokuk*, 94 US (4 Otto) 324, 24 L Ed 224 (1877), and *Utah v. United States*, 403 US 9, 91 S Ct 1775, 29 L Ed 2d 279 (1971)); see also *United States v. Holt State Bank*, 270 US 49, 55-56, 46 S Ct 197, 70 L Ed 465 (1926).

In addressing that question of federal law, the United States Supreme Court has established a disjunctive test for navigability:

"Those rivers * * * are navigable in fact when they *are used, or are susceptible of being used*, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and 'travel on water.'"

The Daniel Ball, 77 US (10 Wall) 557, 563, 19 L Ed 999 (1870) (*italics and boldface added*). The test is applied to the

⁹ That general rule is subject to exceptions; none of which is applicable here, including valid post-statehood conveyance by the state and the application of state laws regarding accretion, erosion, and avulsion.

conditions of the river at the time of statehood. *United States v. Utah*, 283 US 64, 75, 83, 51 S Ct 438, 75 L Ed 844 (1931); see also *Alaska v. Ahtna*, 891 F2d 1401, 1404 (9th Cir 1989) (“[A]t the time of statehood, regardless of the actual use of the river, the river must have been susceptible to use as a highway for commerce.”).

In *United States v. Utah*, the Court reiterated that the test for title navigability is, in fact, disjunctive: to sustain a state’s claim to ownership of submerged lands, the river must have been *either* actually used for travel and trade at the time of statehood *or* susceptible to such use at the time of statehood. 283 US at 81-83. The Court explained the rationale for formulating and employing the alternative “susceptibility” standard, rather than relying exclusively on proof of actual use at the time that a state was admitted to the Union:

[A]s the title of a state depends upon the issue, the possibilities of growth and future profitable use are not to be ignored. [The state], with its equality of right as a state of the Union, is not to be denied title to the beds of such of its rivers as were navigable in fact at the time of the admission of the state either because the location of the rivers and the circumstances of the exploration and settlement of the country through which they flowed had made recourse to navigation a late adventure or because commercial utilization on a large scale awaits future demands. The question remains one of fact as to the capacity of the rivers in their ordinary condition to meet the needs of commerce as those may arise in connection with the growth of the population, the multiplication of activities, and the development of natural resources. And this capacity may be shown by physical characteristics and experimentation as well as by the uses to which the streams have been put.”

Id. at 83.

Since the first elucidation of the *The Daniel Ball* test, courts have found a variety of actual and possible uses to be sufficient to prove navigability, thus establishing a set of broadly stated standards for what may qualify as. "trade and travel * * * in the customary modes." First, with respect to "actual use," it is not necessary that the historic use made of the river have been either widespread or commercially profitable. "The extent of * * * commerce is not the test." *United States v. Utah*, 283 US at 82. For example, the Court's most recent application of the *The Daniel Ball* test upheld a determination of the navigability of Utah's Great Salt Lake based on evidence that the Court described as "sufficient" but "not extensive":

"There were, for example, nine boats used from time to time to haul cattle and sheep from the mainland to one of the islands or from one of the islands to the mainland. The hauling apparently was done by the owners of the livestock, not by a carrier for the purpose of making money. Hence it is suggested that this was not the use of the lake as a navigable highway in the customary sense of the word. That is to say, the business of the boats was ranching and not carrying water-borne freight. We think that is an irrelevant detail. The lake was used as a highway and that is the gist of the federal test"

Utah v. United States, 403 US at 11.

With respect to the particular mode or means of travel or trade utilized, qualifying travel and trade is not limited to large-scale commercial or multiple passenger vessels of the sort typically engaged in modern commerce:

"[The true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

"It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway."

The Montello, 87 US (20 Wall) 430, 441, 22 L Ed 391 (1874), quoted with approval in *United States v. Utah*, 283 US at 76. See also *United States v. Holt State Bank*, 270 US 49, 56, 46 S Ct 197, 70 L Ed 465 (1926) ("[N]avigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats."). The only relevant limitation is that the particular mode of transport be one that was common at the time of statehood. *United States v. Utah*, 283 US at 76. Accordingly, for example, in *Hume v. Rogue River Packing Co*, 51 Or 237, 246, 92 P 1065 (1907); *on reh'g*, 96 P 865 (1908), the court cited use by "boats of small tonnage" as sufficient evidence to declare the Rogue River navigable up to River Mile 18.

Other courts have also recognized the relevance of the historic role of small boats to transport goods in volumes that might seem insignificant by modern standards. See *State of N.D. ex rel. Bd. of Univ., etc. v. Andrus*, 671 F2d 271; 278 (8th Cir 1982), *rev'd on other grounds sub nom, Block v. North Dakota*, 461 US 273, 103 S Ct 1811, 75 L Ed 2d 840 (1983) ("[W]e must bear in mind that the issue is one of potential commercial use and hence navigability at the time of statehood, not in the present day * * * [C]anoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods."); *Alaska v. United States*, 754 F2d 851, 854 (9th Cir), cert den, 474 US 968 (1985) ("[W]e have liberally construed the phrase 'customary modes of trade and travel on water,' taking into account transportation methods in use at the time of statehood." (Citation omitted.)); *Puyallup Tribe of Indians v. Port of Tacoma*, 525 F Supp 65 (WD Wash 1981), *aff'd*, 717 F2d 1251 (9th Cir 1983), cert den, 465 US 1049 (1984) (declaring navigability

on the basis that "Indians navigated the river with their fishing boats and canoes").

Further, the use of rivers" to float timber from upstream logging operations to downstream mill, a widespread practice in the nineteenth and early twentieth centuries, may be sufficient evidence of actual use to establish navigability. See, e.g., *Oregon v. Riverfront Protection Ass'n*, 672 F2d 792, 795-96 (9th Cir. 1982); *Logan v. Spaulding Logging Co.*, 100 Or 731, 190 P 349 (1920); see also *The Montello*, 87 US (20 Wall) at 441. But see *Micelli*, 61 Or at 82 (noting that "[t]he testimony fully supports the findings made by the trial court to the effect that the South Umpqua river, at the place indicated is a nontidal, unnavigable stream, though it had been used at times for floating logs and wood").

Finally, navigability based on either actual use or susceptibility to use may be established despite the presence of obstacles to free passage, such as rapids, riffles, or occasional areas of low water requiring portage, so long as the "natural navigation of the river is such that it affords a channel for useful commerce," *The Montello*, 87 US (20 Wall) at 441. "Navigability does not depend * * * on an absence of occasional difficulties in navigation." *Holt State Bank*, 270 US at 56. See also *United States v. Utah*, 283 US at 84, 86 (noting that conditions created by flood deposits of logs and driftwood "do[] not constitute a serious obstacle to navigation" and that, with respect to shifting sandbars in the river channel, "the mere fact of the presence of such sandbars causing impediments to navigation does not make a river non-navigable").

Rather, and especially in assessing navigability under the alternative "susceptibility" test, the inquiry pertains to the "ordinary conditions" of the stream at the time of statehood.

See *United States v. Utah*, 283 US at 82;¹⁰ *The Montello*, 87 US (20 Wall) at 441 ("If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact."). Expert testimony regarding historic hydrology may be especially probative of a stream's "ordinary" susceptibility at the time of statehood. See *United States v. Oregon*, 295 US 1, 17-21, 55 S Ct 610, 79 L Ed 1267 (1935) (citing "[s]cientific and historical evidence in great volume" regarding the "physical condition of the bodies of water" both at present and at statehood).

With that background, we return to the dispositive inquiry: Was the John Day River, in its ordinary condition at the time of statehood, either actually used for trade and travel by craft

¹⁰ In *United States v. Utah*, the Court provided some basis for evaluating whether periodic conditions of navigation-impairing low flow are extensive enough to constitute the "ordinary condition" of a river and, thus, bar a finding of navigability. In comparing the facts before it to cases in which rivers were found nonnavigable, the Court stated,

"In each of the cases to which the government refers, it was found that the use of the stream for purposes of transportation was exceptional, being practicable only in times of temporary high waters. In the present instance[,] * * * [the river's] susceptibility of use as a highway for commerce was not confined to exceptional conditions or short periods of temporary high water, but that during at least nine months of each year the river ordinarily was susceptible to such use."

283 US at 87. The Court thus distinguished the circumstances before it from those cases where use for transportation was found to be "exceptional" and "only in times of temporary high water," where "the ordinary flow of water is insufficient," or where "only for short intervals, when the rainfall is running off, are the volume and depth of the water such that even very small boats could be operated." *Id.* at 87 n 12 (comparing and quoting *United States v. Rio Grand Dam & Irrigation Co.*, 174 US 690, 699, 19 S Ct 770, 43 L Ed 1136 (1999), and *Oklahoma v. Texas*, 258 US 574, 587, 42 S Ct 406, 66 L Ed 2d 771 (1922)).

commonly employed for such purposes, or Susceptible to such use?

The record contains the testimony and reports of four expert witnesses. Professor Stephen Beckham, an ethnohistorian and professor of history at Lewis and Clark College, testified about historical uses and capacities for navigation of the John Day River, as based on historical, anthropologic, and archeological evidence. Professor Bo Shelby, the Director of the Natural Resources Program at Oregon State University, testified regarding the results of his study of the recreational use and flow requirements for various types of watercraft on the John Day River. Professor Peter Klingeman, a professor of civil engineering at Oregon State University, testified regarding the hydrologic characteristics of the John Day watershed, as based on his investigation and analysis of streamflow, precipitation, and runoff data over the historic period of record. Finally, Robert Ficken, a consultant and freelance historical scholar, testified about the history of navigation and transportation in the John Day area. The trial court found the testimony of Professors Beckham, Shelby, and Klingeman to be credible and helpful.¹¹ In addition to the data and historical records upon which those experts relied, the record also includes the testimony of lay witnesses who regularly make use of the John Day River:

We begin with susceptibility to navigation. On this record, there is compelling direct evidence of the river's capacity to carry travel and trade by means common at the time of statehood. We note, at the outset, that hydrologic data indicates that, in 1859, the river's summer flow was nearly twice what it is today. Due to irrigation withdrawals and channel

¹¹ The trial court found that Mr. Ficken's testimony "was not credible and was not helpful." Based on our *de novo* review of the evidence, we generally concur in the trial court's assessment of the expert testimony.

degradation attributable to upstream mining operations,¹² the summer flow has been reduced by nearly half of what it was at the time of statehood.

We further note that, as described in detail in our discussion of "actual use below, at the time of statehood, various Native American tribes in the Columbia River basin used dugout canoes, which typically drafted six to eight inches, for fishing, travel, and trade. See ___ Or App at ___ (slip op at 20-23).¹³ Persuasive evidence at trial established that modern boats of similar draft traverse the length of the John Day River today with little difficulty. From those facts, we conclude that, in its ordinary condition in 1859, the John Day River as it passes the defendants' properties would have provided ample capacity for travel and trade by means of dugout canoes. See *The Montello*, 87 US (20 Wall) at 422 ("Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted."); *Puyallup Tribe of Indians*, 525 F Supp at 72 (declaring navigability on the basis that "Indians navigated the river with their fishing boats and canoes").

¹² For example, a gold mining rush in the upper John Day River basin beginning in 1862 initially involved only placer mining but eventually involved hydraulic mining as well. Hydraulic mining diverted significant quantities of water from the river and also caused considerable amounts of gravel, mud, sand, and silt to be deposited in the stream bed. Similarly, diversions for agricultural irrigation began in 1862.

¹³ For example, Professor Beckham testified as follows:

"Though the plateau is an arid environment, it is bisected by major river systems, the Columbia and the Snake, and then all those multiple tributaries, the Wenatchee, the Methow, the Okanogan, the Yakima, [the] Deschutes, the John Day, and these were streams on which native people traveled by canoe.

"They were also—their primary subsistence on the plateau was fishing, and living in an environment with water it was necessary to cross those rivers and also to access food resources."

A variety of post-statehood events involving actual use of the John Day further corroborate the stream's susceptibility to navigation as of 1859, *See United States v. Utah*, 283 US at 82 (citing evidence of actual navigation that occurred three decades after statehood as "relevant upon the issue of the susceptibility of the rivers to use as highways of commerce at the time Utah was admitted to the Union").

First at least three vessels operated on or traversed the John Day in the late nineteenth century or early twentieth century. From 1889 to 1899, a pleasure boat sternwheeler, the "John Day Queen," plied a ten-mile stretch of the river above Clarno Rapids, from approximately River Mile 110 to River Mile 120, roughly ten miles downriver from the Miani defendants' property. After the turn of the century, that vessel was replaced with a newer sternwheeler, imaginatively christened the "John Day Queen II" which operated along the same stretch of river during the first decade of the last century. Further, in 1900, the Twickenham Ferry was relocated to Ferry Creek, 90 miles downstream, which required the ferry to traverse that stretch of the river, passing what is now the Miani defendants' property along the way. Again, given the mining-related degradation of the river's channel and the diversion of stream flows beginning in the 1860s, the river's capacity to carry commerce was almost certainly greater at the time of statehood than it was during the heyday of the John Day Queens and the Twickenham Ferry.

Second, there is evidence of at least one log drive on the John Day River in the 1920s, conducted by the Chee Lumber Company. In 1923, the company secured a franchise from the State of Oregon to transport timber down the John Day to a planned saw mill near the river's mouth.¹⁴ The company intended to harvest some of the estimated two billion board feet of timber located in the upper John Day basin. News-

¹⁴ Such franchises were authorized by Oregon Laws 1917, chapter 128.

paper reports from 1925 describe plans to place 20 logs, each 16 feet long, in the river in the vicinity of Service Creek (approximately 20 miles upstream from the Miani defendants' property) and to float these logs downstream, accompanied by a boat with two men to monitor their progress. That test run apparently proved successful because the company's 1925 annual franchise report to the state reported moving 200,000 board feet of timber down river in that year. Although defendants and intervenor question the accuracy of that report, the success of the 1925 drive is persuasively corroborated by the fact that, between 1927 and 1929, the Chee Lumber Company purchased 5,440 acres of timberland in the headwaters area—an investment that it would not likely have made without some assurance of the ability to transport that timber downstream.¹⁵ In all events, the evidence in this record regarding the 1925 log drive does not show “difficulties precluding utility,” as was found in a case involving the potential for “rafting of logs or freight” on the Arkansas River. See *United States v. Brewer-Elliott Oil & Gas Co*, 249 F 609, 623 (WD Ok 1918), *affd*, 270 F .100 (8th Cir 1920), *aff'd*, 260 US 77 (1922).

We note again, as with the navigation of the John Day by vessels after statehood, hydrologic conditions in 1925 were almost certainly less hospitable to transport of log rafts than they would have been at statehood, due to the intervening mining-related channel degradation and irrigation withdrawals. Thus, the 1925 log drive is additional evidence that river conditions at the time of statehood were such as would have permitted commerce, viz., timber transport.

¹⁵ Newspaper reports from 1929 indicate that Chee Lumber Company may have attempted a second log drive at that time. However, there is no evidence whether that drive was successfully completed. Ultimately, apparently as a result of its inability to secure financing to build the mill, Chee abandoned its efforts on the John Day.

We thus conclude, on *de novo* review, that, as of 1859, the segments of the John Day River at issue here were susceptible to both travel and trade by craft common to that time. Our review of the hydrologic conditions and of the evidence of post-statehood use persuades us that the John Day was indeed capable of sustaining at least three types of commerce at the time of statehood: Native American canoe-based trade, log runs, and sternwheeler traffic. Here, as in *United States v. Utah*, "conditions of exploration and settlement explain the infrequency or limited nature of such use." 283 US at 82; see also *Holt State Bank*, 270 US at 57 (discounting import of fact that "navigation was limited" at statehood as explained by fact that "trade and travel in that vicinity were limited").

Given the disjunctive nature of *The Daniel Ball* test, our determination that the John Day was susceptible to use for travel and trade at the time of statehood is conclusive. However, from prudential caution, we, like the trial court, elect to also address the alternative "actually used for travel and trade" criterion for title navigability. Although the evidence in this record of actual use of the John Day River in the prestatehood period is indirect and circumstantial, we find that evidence to be ultimately persuasive as to "actual use" in the lower John Day River as it passes the Schlechts' and Simantels' properties, but not as it passes the Miani defendants' property.

The lower basin of the John Day River drainage was occupied throughout the nineteenth century by Native Americans known as the Western Columbia River Sahaptin ("Western Sahaptin"),¹⁶ sometimes referred to (inexactly) as

¹⁶ The nomenclature "Western Columbia River Sahaptin" is used by historians and ethnographers to distinguish the people of the Deschutes, John Day, and Willow Creek areas from those of other Sahaptin-language speaking groups, including the peoples of the modern-day Umatilla and Walla Walla areas and the Yakama people, who occupied the area north

the Tenino.¹⁷ The Western Sahaptins were an interrelated linguistic and cultural group that ranged over a network of village communities located along the middle Columbia River and its tributaries. Specifically, their villages were located along the stretch of the Columbia River westward from present day Paterson to just upriver from The Dalles, and on the lower stretches of the tributaries feeding that section of the Columbia, including the Deschutes River, the John Day River, and Willow Creek.

Sahaptins of the John Day River relied primarily on fish, particularly salmon, as their basic food source. The John Day salmon fishery was "of considerable importance" to the Western Sahaptins of the John Day basin. When salmon was not available, the indigenous people fished for steelhead in the lower John Day River, as well as for suckers, whitefish, trout, and chub.

Each riverside village was associated with an extensive area of remote and undeveloped countryside that was systematically used by extended family parties to harvest resources, such as berries, animal skins, grasses, roots, and, of course, fish. Those areas for gathering resources extended along the river drainage basins of the many tributaries feeding this section of the Columbia, ranging from as far north as the berry-gathering ground known as "Indian Heaven" southwest

of the Columbia River directly across from the mouth of the John Day River and who were close kin to the Sahaptin people of the John Day area.

¹⁷ "Tenino" refers to the westernmost Sahaptin-speaking village of the Columbia River Sahaptin peoples, located just downstream from the famous Native American fishing grounds and trade center at Cello Falls. The Cello Falls area is located approximately 25 miles downstream from the confluence of the John Day and Columbia rivers. Before those fabled falls were flooded by construction of The Dalles Dam in 1957, native peoples from throughout the Pacific Northwest traveled to Cello for nearly 10,000 years to fish and trade. Professor Beckham described Cello as the "crossroads of the interior of the Pacific Northwest."

of Mount Adams to as far south as the present city of John Day. The Western Sahaptins' traditional gathering areas thus spanned the basins of the Deschutes and John Day rivers and upper Willow Creek, as well as much of the Columbia River corridor from The Dalles to present-day Paterson.

Western Sahaptins engaged in a substantial network of trade relations-throughout this area and with groups from west of the Cascades through the Columbia Gorge and at Cello Falls. Items of trade included roots, berries, skins, dried salmon, hemp twine (used for weaving fishing nets and root-collecting bags), obsidian (from which arrowheads were fashioned), and bear grass (for basket weaving). The Western Sahaptin trade network extended throughout the Columbia River basin and crossed linguistic and family groupings. Historians have documented Western Sahaptin use of dugout canoes on rivers throughout their traditional territory.¹⁸

As noted, the Western Sahaptins' traditional territory encompassed the lower John Day River drainage. A separate cultural and linguistic group, the Northern Paiute, occupied the upper John Day River drainage, upstream of the Clarno Rapids from River Mile 100 to roughly River Mile 240, and had established fishing camps and villages : on the North Fork of the John Day River. As noted, __ Or App at __ n 13 (slip op at 17 n 13), Professor Beckham testified generally that indigenous people who lived in the Columbia River basin used canoes for travel and trade. However, he did not testify specifically as to the Northern Paiutes' use of canoes on the upper reaches of the John Day River.

There are no known eyewitness accounts of Native Americans using dugout canoes upstream from the mouth of the John Day. In 1805, as they traveled west along the Columbia

¹⁸ However, as discussed below, __Or App at __ (slip op at 24), there has been no archeological corroboration of the use of dugout canoes by Western Sahaptin people on the John Day specifically.

River towards the Pacific Ocean, Lewis and Clark encountered a significant number of Western Sahaptins in canoes at the confluence of the Columbia and John Day rivers, but Lewis and Clark did not explore upstream. In 1811, the overland party of John Jacob Astor's Pacific Fur Company, including John Day, for whom the river is named, passed through the area but recorded no mention of canoe use on the river. In 1825 and 1831, parties of the Hudson's Bay Company also explored the John Day basin and did not record any mention of Indian use of dugout canoes on the river. Those parties did not themselves travel on the John Day by canoe; instead, they traveled overland, by foot or on horseback, northeast across the plateau to their depot at Fort Walla Walla.

The Oregon Trail crossed the John Day River very near the location of the present day Schlecht and Simantel properties; many pioneers noted the river crossing in their journals, but, again, did not mention any canoe use. Finally, immediately before statehood, between 1855 and November 1858, the United States Army barred settlement in the area in order to prevent conflict between settlers and Native Americans.

Intervenor or argues that the foregoing evidence is insufficient to prove actual use of canoes on the John Day by indigenous peoples before statehood—and, indeed, that the lack of physical or recovered historical evidence of such use disproves such use. Intervenor is correct that, while there is considerable, indeed uncontroverted, evidence that Native Americans used dugout canoes on rivers throughout the Columbia River basin, there is no direct evidence in this record of such use on the John Day River specifically. For example, there is no archeological evidence in this record establishing the presence of canoes in the John Day River channel up to 1859.

Nevertheless, that absence of direct—as opposed to circumstantial and inferential—proof is hardly dispositive.

Archeological investigation in the John Day basin has been relatively limited; Professor Beckham testified to the identification of roughly a dozen sites of potential historic interest. Moreover, without some better contextual grounding in the record as to what fur trappers and pioneers typically recorded in their journals, we hesitate to ascribe much weight to the absence of references in their writings to Native American canoe use on the John Day. Thus, our assessment of actual use reduces to whether plaintiffs' circumstantial evidence of such use is persuasive, notwithstanding the absence of any direct corroboration.

On balance, we find that plaintiffs proved "actual use" in the vicinity of the Schlechts' and Simantels' properties, but not in the vicinity of the Miani defendants' property. With respect to the former, we note; particularly, the following colloquy between plaintiffs' attorney and Professor Beckham regarding a scholarly article on Sahaptin fishing practices in the John Day.

"Q: * * * And, in fact, this same [Sahaptin] tribe in this same article^[19] fished from canoes, did it not?

"A: Yes.

"Q: All right. Is there any reason to believe that canoes were not used to fish by the [Sahaptin] at these fisheries which were documented that they participated in in the lower John Day [R]iver?

"* * * * *

"A: No. There was no such reason. The fishery was central to these people's survival and fishing from canoes was an established practice throughout this entire region. And here it is referenced specifically to the

¹⁹ The article referenced is Gordon Hughes, *Fishing*, in 12 HANDBOOK OF NORTH AMERICAN INDIANS 612, 625 (William C. Sturtevant, ed. 1998).

[Western Sahaptin], whose homeland included the John Day.”

We find that testimony ultimately persuasive. By its terms, however, it refers only to the Western Sahaptins, who, Professor Beckham testified, occupied the *lower* John Day basin, that is, downstream of River Mile 100. In context, the circumstantial evidence of actual use of the river upstream of River Mile 100, the region inhabited by the Northern Paiute, is much less comprehensive and persuasive. Accordingly, we conclude that plaintiffs failed to show “actual use” of the John Day River in 1859 at the location of the Miani defendants’ property, River Miles 133-135.

In sum, we find that (1) at the time of statehood, the John Day River was susceptible to navigation as it passes defendants’ properties; and (2) at the time of statehood, the John Day River was actually used for travel and trade as it passes the Schlechts’ and Simantels’ properties, but not as it passes the Miani defendants’ properties. Accordingly, the State of Oregon held, and holds, title to the land lying below the ordinary high water mark as it passes the real property owned by the Simantels, the Schlechts, and the Miani defendants.

We reject the parties’ remaining assignments of error without discussion.

Affirmed.

APPENDIX C

**IN THE SUPREME COURT OF THE
STATE OF OREGON**

Marion County Circuit No. 99C12309
SC S52625
CA A118737

NORTHWEST STEELHEADERS ASSOCIATION, INC.,
an Oregon nonprofit corporation, **RAYMOND D. DEZELLEM;**
and RICHARD "RICK" ALLEN,
Plaintiffs-Respondents, Respondents on Review,

v.

DAVID SIMANTEL TAMMY SIMANTEL, and
WILLIAM WYATT, et al.,
Defendants,

and

DAVID K. SCHLECHT, SARAH J. SCHLECHT,
Defendants-Appellants, Petitioners on Review,

and

MIANI, WILLIAMSON & EVANS,
Defendants-Appellants

and

ROBERT JON GROVER,
Intervenor-Appellant, Petitioner on Review.

38a

ORDER DENYING

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

Dated this 4th day of October 2005.

/s/ Wallace P. Carson. Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

APPENDIX D

**IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION**

No. 99C-12309

NORTHWEST STEELHEADERS ASSOCIATION, INC.,
an Oregon nonprofit corporation and Petitioner;
RAYMOND D. DEZELLEM; and RICHARD "RICK" ALLEN,
Plaintiffs,

v.

DAVID SIMANTEL and TAMMY SIMANTEL, husband and wife,
STATE OF OREGON, by and through the Oregon State Land
Board; DAVID K. SCHLECHT, and SARAH J. SCHLECHT, and
MIANI, WILLIAMSON & EVANS,

Defendants,

and

ROBERT JON GROVER,
Defendant/Intervenor.

Assignment: Hon. Paul J. Lipscomb

DEFENDANTS/INTERVENORS' JOINT TRIAL BRIEF

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lawsuit.”⁵ This is true on several fronts. First, no case in Oregon has ever used the Public Trust doctrine solely to quiet title on a questionably navigable stream. Second, no Oregon or federal case has ever found that a non-meandered river with the limited capacity for use that the John Day possesses is a navigable river under the federal test. Third, no case in Oregon has ever found a fresh water stream to be subject to the Doctrine of Custom. Finally, no case in applying Oregon’s state navigability in fact test has ever found that a river subject to floating for a particular purpose divests the riparian owner of any rights to exclude trespassers from the banks of that river.

The evidence in this case will show that the John Day River has *never* been considered a navigable river by the State of Oregon or under *any* test at law. Its use has been historically limited by the tortuous nature of the river’s run as well as its uneven and unpredictable flows. It did not sustain commerce at the time of statehood, nor was it used as a channel of commerce during the heyday of the region’s timber and mining industries. It is merely a river that modern day floaters with modern day watercraft float seasonally. In sum, the John Day has never been, and therefore is not now, a navigable river.

II. PLAINTIFFS CLAIM TO QUIET TITLE TO THE BANKS AND BEDS OF THE JOHN DAY.

A. The Federal Test for Title Navigability

In the 1920s, navigability became a question of Federal Law.⁶ To answer the question of whether a waterbody is

⁵ See Plaintiffs’ Response to Grover’s Motion to Dismiss, pp. 9-10.

⁶ See *United States v. Holt State Bank*, 270 US 49, 55-56, 46 S Ct 197, 70 L Ed 465 (1926); see also *Utah v. United States*, 403 US 9, 10, 91 S Ct 1775, 29 L Ed 2d 279 (1971); *United States v. Oregon*, 295 US 1, 14, 55 S Ct 610, 615, 79 L Ed 1267 (1935); *United States v. Utah*, 283 US 64, 75,

navigable, the Supreme Court adopted a test originally articulated in an 1870 admiralty case, *The Daniel Ball*.⁷ The Supreme Court has since applied the test used in

* * * *

51 S Ct 438, 75 L Ed 844 (1931); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 US 77, 43 S Ct 60, 67 L Ed. 140 (1922).

⁷ 77 US (19 Wall) 557, 19 L Ed 999 (1870). As will be set forth in greater detail below, there are three kinds of federal "navigability" determinations: (1) navigability determinations for

APPENDIX E
IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Marion County Circuit Court No. 99C 12309
CA No. A118737

NORTHWEST STEELHEADERS ASSOCIATION, INC., an Oregon
nonprofit corporation, RAYMOND D. DEZELLEM; and
RICHARD "RICK" ALLEN,
Plaintiffs-Respondents,

v.

DAVID SIMANTEL and TAMMY SIMANTEL, and
WILLIAM WYATT, et al.,
Defendants,

and

DAVID K. SCHLECHT, SARAH J. SCHLECHT, and
MIANI, WILLIAMSON & EVANS,
Defendants-Appellants,

and

STATE OF OREGON, by and through the
Oregon State Land Board,
Defendant-Respondent,

and

ROBERT JON GROVER,
Intervenor-Appellant.

INTERVENOR-APPELLANT'S OPENING BRIEF
AND EXCERPT OF RECORD

Appeal from the Judgment of the Circuit Court of the
State of Oregon for the County of Marion The Honorable
Paul J. Lipscomb

* * * *

Vol. 7, pp. 77, 83, 108.) Allen said, "Fine, you can call the Sheriff. He's not going to do anything. We didn't do anything wrong." One of the other boats in Allen's party arrived at that point. The individuals in that boat also landed on the gravel bar. (Vol. 4, p. 164.) Williamson and the other woman who was with her, Colleen Neal, went back to the house that was on the property. They returned to the riverbank, with Neal carrying an unloaded rifle. (Vol. 7, p. 78.) The gun was never pointed in the direction of the boating party. (Vol. 4, p. 180.) At that point, Allen and the rest of the party got back in their boats and floated on down the River. As Allen floated by Williamson and Neal, he heard one of the women say that if they wanted to pay, they could fish and that she was running a business. (Vol. 4, p. 166.) As an owner, Williams pays taxes on the bed and banks of the River. (Vol. 7, p. 88.)

FIRST ASSIGNMENT OF ERROR

- I. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE JOHN DAY RIVER, AT THE STRETCHES INVOLVED IN THIS CASE, WAS NAVIGABLE AT THE TIME OF OREGON STATEHOOD AND THAT THEREFORE TITLE TO ALL LANDS LYING BELOW THE ORDINARY HIGH WATER MARK WAS VESTED, AT THE TIME OF STATEHOOD, IN THE STATE OF OREGON. (ER 30, 34.)

A. Preservation of Error.

At all times during his participation in this litigation, Grover has contended that the John Day River was not navigable at

the time of Oregon statehood and that title to the submerged and submersible lands did not vest in the State of Oregon. Grover's position was set forth in the Defendants/Intervenor's Joint Trial Brief and in closing argument. (Defendant/Intervenor's Joint Trial brief, pp. 4-18; ER 42; Vol. 9, p. 82.)

B. *Standard of Review.*

The question of whether a river or other body of water is "navigable" is a question of federal law. *United States v. Oregon*, 295 US 1, 55 S Ct 610, 79 L Ed 1267 (1935). Both the standards and the ultimate conclusion regarding navigability involve questions of law that are inseparable from the particular facts to which they are applied. *United States v. Appalachian Electric Power Company*, 311 US 377, 404, 61 S Ct 291, 85 L Ed 243 (1940). Review of the court's legal conclusions regarding navigability is *de novo*. *State of Oregon v. Riverfront Protection Association*, 672 F2d 792 (9th Cir 1982).

C. *Argument.*

1. *The Equal Footing Doctrine.*

The English possessions in America were claimed by the English Crown pursuant to a right of discovery. After victory in the Revolutionary War, "all the rights of the Crown and of Parliament were vested in the several states." *Shively v. Bowlby*, 152 US 1, 14-15, 14 S Ct 548, 38 L Ed 331 (1894). Prior to the ratification of the United States Constitution, the several states agreed to an ordinance designed to bring the Northwestern Territory into the United States, commonly known as the Northwest Ordinance. *An Ordinance for the Government of the Territory of the United States, Northwest of the Ohio River* (July 17, 1787) ("Northwest Ordinance"). Article 5 of the Northwest Ordinance called for the admission of new states into the Confederacy of the United States on an "equal footing" with the original states. *Northwest Ordinance*, Article 5. Article 4 stated that the navigable waters

leading into the Mississippi and St. Lawrence Rivers shall be "common highways and forever free to the inhabitants of the said territory and the citizens of the United States as well as any future states admitted into the Confederacy." *Northwest Ordinance*, Article 4. As each state was admitted to the Union, title to the bed and banks of its "navigable waters" passed from the federal government to that state, as an attribute of the state's sovereignty. *Pollard v. Hagan*, 44 US (3 How.) 212, 228-229, 11 L Ed 565 (1845).

In 1848, the United States established the territorial government of Oregon. *An Act to Establish the Territorial Government of Oregon* (August 11, 1848) ("Territorial Act.") The

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APPENDIX F
IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Marion County Circuit Court No. 99C-12309
CA A118737

NORTHWEST STEELHEADERS ASSOCIATION, INC., an Oregon
nonprofit corporation and Petitioner, RAYMOND D.

DEZELLEM; and RICHARD "RICK" ALLEN,
Plaintiffs-Respondents,

v.

DAVID SIMANTEL, TAMMY SIMANTEL, and
WILLIAM WYATT, *et al.*,
Defendants,

and

DAVID K. SCHLECHT, SARAH J. SCHLECHT, and
MIANI, WILLIAMSON & EVANS,
Defendants-Appellants,

and

STATE OF OREGON, by and through the Oregon
State Land Board,
Defendant-Respondent,

and

ROBERT JON GROVER,
Intervenor-Appellant.

DEFENDANTS-APPELLANTS' BRIEF

Appeal from Judgment Entered June 21, 2002 of the Circuit
Court for the County of Marion
The Honorable Paul J. Lipscomb, Judge

873 P2d 456 (1994). Determination of the existence of historical facts to prove the existence of a justiciable controversy is reviewed for substantial evidence in the record and the legal conclusion that a justiciable controversy exists is a matter of law and review is for error of law. *See, Forsythe v. Homestead Development Corp.* 142 Or App 45, 50, 919 P2d 537 (1996).

C. Argument: No Justiciable Controversy Exists Regarding the Schlechts.

The trial court did not make findings of fact about the existence of a justiciable controversy. Thus, identification of the facts in the record is difficult. The only references to the Schlecht name in the record were for the purposes of establishing the location of the Schlecht property on various maps or other exhibits. There is no allegation that any member of the Schlecht family took any action against any Plaintiff. There is no evidence that any Plaintiff was excluded from the portions of the John Day River below the high-water mark on the Schlecht property by anyone. In sum, there is no allegation nor proof of any justiciable controversy involving the Schlechts and the navigability of the John Day River.

"A controversy is justiciable, as opposed to abstract, where there is an actual and substantial controversy between parties having adverse legal interests. The controversy must involve present facts as opposed to a dispute which is based on future events of a hypothetical nature. A justiciable controversy results in specific relief through a binding decree as opposed to an advisory opinion which is binding on no one. The court cannot exercise jurisdiction over a nonjusticiable controversy because in the absence of constitutional authority, the court cannot render advisory opinions." *Brown v. Oregon State Bar*, 293 Or 446, 449, 648 P2d 1289 (1982) [citations omitted].

The problem with this case is that there is no "actual and substantial controversy" between any Plaintiff and the Schlechts which involves present facts. It may be that at some time in the future an owner of the Schlecht property will try to exclude a Plaintiff or some other member of the general public from the portion of the Schlecht property which lies below the high-water mark of the John Day River. But that future event is hypothetical in nature and may never occur. The declaratory judgment action against the Schlechts should have been dismissed.

2. *SECOND ASSIGNMENT OF ERROR: THE COURT ERRED IN FINDING THE JOHN DAY RIVER NAVIGABLE.*

A. Preservation of Error. At all times throughout the litigation, Defendants Schlecht and Miani have contended the John Day River was not navigable at the time of Oregon statehood and that the title to the submerged and submersible lands of the John Day River did not vest in the State of Oregon. These Non-State Defendants' positions were set out in the Defendants/Intervenors Joint Trial Brief, Motion to Dismiss (Tr. Vol. VII, P 153-155) and in closing argument.

B. Standard of Review. The Non-State Defendants adopt the Standard of Review set out in Intervenor Grover's Appellant's Brief.

C. Argument. The Non-State Defendants adopt the Argument set out in Intervenor Grover's Appellant's Brief. In addition, the Non-State Defendants offer the following additional argument.

All of the Non-State Defendants derived their titles from patents issued by the United States of America. Ex 122, 123. For example, the patents for Miani, Williamson and Evans were issued on October 8, 1898 to William Byrd. Ex 122. None of the navigability evidence used by Plaintiff had occurred on or before the dates of the patents. Much of the

technology relied upon by the Plaintiffs to prove navigability (drift boats, rubber rafts, kayaks, etc) did not exist at the time the patents issued.

There is little surprise, then, that the jury found:

“We believe it was the intent of the US government to sell the land that included the bed and banks of the John Day River. Unfortunately, that is not the question that was given to this jury, and we wanted that to be known.”
(Tr. Vol. X, pp 10-11.)

No one with any sense of historical perspective could have come to any other conclusion. When the patents issued, there is no evidence anyone one had ever successfully navigated the length of the John Day River in any craft or with any product—such as a log drive. The entire history

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APPENDIX G

IN THE SUPREME COURT OF THE STATE OF OREGON

Marion County Circuit Court

Case No. 99C 12309

CA No.: A118737

SC No.: ____

NORTHWEST STEELHEADERS ASSOCIATION, INC., an Oregon
nonprofit corporation, RAYMOND D. DEZELLEM; and

RICHARD "RICK" ALLEN,

Plaintiffs-Respondents/Respondents on Review,

vs.

DAVID SIMANTEL, and TAMMY SIMANTEL, and

WILLIAM WYATT, *et al.*,

Defendants,

and

DAVID K. SCHLECHT, SARAH J. SCHLECHT, and

MIANI, WILLIAMSON & EVANS,

Defendants-Appellants/Petitioners on Review

(Schlechts only),

and

STATE OF OREGON, by and through the Oregon

State Land Board,

Defendant-Respondent, Respondent on Review,

and

ROBERT JON GROVER,

Intervenor-Appellant and Petitioner on Review.

JOINT PETITION FOR REVIEW OF ROBERT JON
GROVER AND DAVID AND SARAH SCHLECHT

Petition for Review of the Decision of the
Court of Appeals on appeal from a judgment of the
Circuit Court for Marion County,
Honorable Paul J. Lipscomb

OPINION FILED: May 11, 2005
AUTHOR OF OPINION: Honorable Rick Haselton
CONCURRING: Honorable Darleen Ortega, Mary Deits,
judge pro tempore

PETITIONERS ON REVIEW INTEND TO
FILE A BRIEF ON THE MERITS

Listing of Counsel inside cover

July 2005

* * * *

John Day. (Vol. II, pp. 221-222.) In 1933, the United States Army Corps of Engineers published a study of the John Day River and concluded that the river was not navigable. (Ex. 265, p. 85.) Two reports authored by the Oregon State Land Board Advisory Committee in 1970 and 1972 to identify navigable waterways in Oregon did not list the John Day River as a navigable waterway. (Ex. 115, Ex. D; Ex. 134) In 1977, the Oregon Division of State Lands reported to the United States Department of the Interior that the John Day River was not a navigable waterway. (Ex. 101.)

B. QUESTIONS PRESENTED ON REVIEW

1. Is the John Day River navigable at the segments at issue in this case under the test set forth by the United States Supreme Court in *The Daniel Ball*, 77 US 557, 19 L Ed 999 (1871), a test which requires that, at the time of statehood, the waterway was used, or was susceptible for use, as a highway for commerce over which trade and travel were or could be

conducted in then customary modes of trade and travel on water?

2. Is a waterway a highway for commerce under *The Daniel Ball* test when the evidence of Native American use consists solely of a modern historian's opinion that Native Americans must have used canoes on the river simply because they used them on other rivers on the Columbia Plateau and despite the fact that there is no direct evidence of such use on the John Day River?

3. Is a waterway a highway for commerce under *The Daniel Ball* test when the only evidence of alleged commercial use by settlers consists of operation of a sternwheeler at segments of the river not at issue in this case and reports of two planned log drives without any historical evidence as to whether the drives were successful and without any evidence that the John Day River was ever the site of any ongoing timber operations?

4. If the Court relies on Native American use to support a finding of navigability, must that use rise to the level of *both* trade and travel?

5. Should the Court require, a higher degree of proof with regards to use or susceptibility of use at the time of statehood before making a finding of navigability, a finding that disturbs long settled expectations regarding property rights on a waterway?

C. PROPOSED RULE OF LAW

The Court of Appeals' decision has the practical effect of making any waterway upon which a canoe can be floated at certain times of the year a navigable waterway. It eviscerates *The Daniel Ball* test and replaces it with one that requires mere evidence that the waterway is susceptible to being floated. The Court of Appeals' decision expands the potential universe of "navigable" waterways to include nearly ever river or stream in Oregon.

Petitioner seeks a ruling from this Court which would make it clear that substantially more evidence is necessary to support a finding of navigability. Petitioner requests that this Court formulate a rule which would return the law of navigability to what the United States Supreme Court has long held: that a waterway is not navigable unless it has either been used or is susceptible to use as a generally and commonly useful "highway for commerce" over which trade and travel either have been or may be conducted using modes of trade and travel that were customary at the time of statehood. This Court should reverse the decision of the Court of Appeals and find that correct application of *The Daniel Ball* test requires a finding that the segments of the John Day river at issue in this case are not navigable. Hence, title to the submerged and submersible lands did not pass to the State of Oregon at the time of statehood.

D. REASONS FOR GRANTING REVIEW

The legal questions presented on review have importance beyond this particular case and require decision by the Supreme Court. ORAP 9.05(4)(c). Thousands of individual Oregonians and businesses in the State own property bordering the numerous streams, rivers, lakes and other bodies of water that exist here. Many of these individuals and businesses pay real property taxes calculated by including the beds and banks of these waterways as property that they own. Many of these individuals and businesses have been led to believe over many years that they possess ownership interests and have the right to exclude others from property. An erroneous and

* * * *

APPENDIX H

EAST OREGONIAN.info

HEADLINE NEWS

Wednesday, June 15, 2005

Board declares John Day navigable

By DAVID SALE of the-East Oregonian
dsale@eastoregonian.com

FOSSIL—The State Land Board's declaration of John Day River navigability Tuesday came as a blow to riverside property owners, but a victory for anglers and boaters.

The board voted 2-0 with Gov. Ted Kulongoski and Secretary of State Bill Bradbury supporting the navigability declaration. The State Land Board's third member, State Treasurer Randall Edwards, abstained. The declaration takes effect 60 days after legal notification of landowners, which is expected within the next two weeks.

The ruling means John Day River banks and beds between Tumwater Falls and Kimberly are the property of the state and can be used by boaters and anglers without permission of adjacent landowners.

Wheeler County Commissioner John Asher, who owns a mile-and-a-half of riverfront property in Spray, could not be more succinct in his reaction.

"I can't believe these idiots," Asher said. "All Kulongoski and Bradbury had to do was wait and let the Legislature handle this."

By finding the John Day River navigable, the state has asserted ownership of more than 174 miles of the river channel as well as both banks below the mean high water line.

The declaration is a de facto property seizure, for which he and other property owners are entitled to compensation, Asher said.

"I believe the public has a right to use the river, and I don't have a problem with people fishing on the banks," Asher said: "But I don't like the state taking over land that my family's held a deed to for 83 years, without compensation."

While landowners along the John Day are entitled to a reimbursement from county government on back taxes, the finding of navigability is based on the legal conclusion the John Day River and its banks have been public property since Oregon achieved statehood in 1859.

"The determination is that the stream channel never was privately owned, despite what these property deeds claim, so no compensation would be required," said David Petersen, director of the John Day chapter of the Association of Northwest Steelheaders.

Petersen, who works as a business attorney in Bend, hailed the decision as a victory for his fellow anglers and other recreational users.

"Now; we have the chance to enjoy the river and be free of concerns about trespassing. On some stretches it's been very contentious," he said. "Some landowners have deeds where their property line is drawn at the center of the stream, and they would prevent people from boating on the river, much less landing on the banks."

The declaration on the John Day is one that could apply equally well to all of Oregon's rivers; but the Land Board can only declare navigability on a case-by-case basis.

Both landowners and recreational users hope to find a comprehensive solution, but it's been slow in coming.

If approved and signed into law; Senate Bill 1028, among others being considered, would establish provisions for recreational use on all Oregon waterways.

Besides determining which rivers are open to the public, the bill would set out terms and conditions for river use and create a fee for boaters to fund policing and education efforts.

Phil Donovan, a lobbyist for Northwest Steelheaders, said the group welcomed a statewide solution, but did not agree with charging boaters to use public property.

The Oregon Farm Bureau Federation, also opposes the bill because it would open rivers that may not meet navigability requirements and are therefore not state property, said Katie Fast, a lobbyist for the group.

The delays in adopting such legislation may have encouraged members of the State Land Board to send a message, according to Northwest Steelheaders Legislative Director Gary Benson.

"The navigational study for the John Day was requested eight years ago," Benson said. "The Land Board was supposed to act in February, but probably they felt they couldn't defer to the Legislature any longer. Apparently Kulongoski and Bradbury felt enough time had elapsed, and they needed to take action."

Meanwhile, the Land Board has received requests to determine whether portions of six other Oregon rivers—Rogue, South Umpqua, Kilchis, Trask, and North and South Santiam rivers—are navigable.

"We want clarity on this issue—not access to private property," Benson said: "When Oregon was first declared a state, it didn't assert its ownership to state waterways, as provided under the federal articles of admission. That's why we have these property lines drawn mid-stream."

I can see why the property owners would become upset when the government points out that their boundary is invalid, but I've been working on this issue for 10 years, and the law is firmly on the public's side," Benson added. "The title companies themselves caught on years ago. You can't get your property insured past the high-water line for that very reason."

Although the John Day has been opened, the question of property rights and fair use is one that both sides will continue to debate.

"I imagine there will be a lot of lawsuits, under Measure 37," Asher said. "We're going to have to resurvey our property to establish the new boundaries. It's going to be a real dogfight."

Speaking on behalf of boaters and anglers, Benson was equally resolved.

"The state caused this problem, and the state needs to fix it. What the Land Board has done here is a Band-Aid," he said. "If no legislative solution is found for the whole state, it's something the board will have to do river by river."

APPENDIX I

Division of Mining, Land & Water Alaska Department of Natural Resources

State Policy on Navigability

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II. Legal and Policy Guidelines Governing Management of Submerged Lands and Public Waters

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Public Waters

Boundaries of Navigable Waters

Conclusion

**Policies and Procedures on Ownership and
Management of Navigable and Public Waters**

June 18, 1996 State ownership of the beds of navigable waters is an inherent attribute of state sovereignty protected by the United States Constitution. *Utah v. United States*, 482 U.S. 193 (1987). Under the doctrine, all states enter the Union on an equal footing with respect to sovereign rights and powers, title to the beds of navigable waters in Alaska vested in

the newly formed State of Alaska in 1959. In addition, under the Alaska Constitution and the public trust doctrine, all waters in the state are held and managed by the state in trust for the use of the people, regardless of navigability and ownership of the submerged lands under the Equal Footing Doctrine.

The purpose of this paper is to describe the State of Alaska's policies and procedures for identifying and protecting the state's title to the beds of navigable waters. In addition, this paper outlines the legal and policy considerations which guide the ownership and management of submerged lands and public waters.

I. IDENTIFYING AND PROTECTING STATE TITLE TO THE BEDS OF NAVIGABLE WATERS

Identification and management of the beds of navigable waters is an important policy of the State of Alaska. In 1980, the state established a comprehensive navigability program to respond to federal land conveyances and land management activities under the Alaska Statehood act, the Alaska Native Claims Settlement Act (ANCSA), and the Alaska National Interest Lands Conservation Act (ANILCA). Pursuant to the provisions of those acts, the federal government has issued navigability determinations for thousands of lakes, rivers, and streams throughout the state in an effort to determine whether the state or federal government owns the submerged lands. Navigability determinations are also made prior to many state land disposals to insure that adequate public use easements are reserved.

The basic purpose of the state's program is to protect the public rights associated with navigable waters, including, in particular, the state's title to the submerged lands. Because state and native land selections and federal conservation units blanket the state, navigability questions have arisen for rivers, lakes, and streams throughout Alaska. The navigability of

many of those waterbodies has already been established. There are hundreds of others, however, where navigability is not yet determined.

To help resolve these navigability disputes, a major goal of the state's navigability program is to identify the proper criteria for determining title navigability in Alaska and to gather sufficient information about the uses and physical characteristics of individual waterbodies so that accurate navigability determinations can be made as disputes arise. Other important aspects of the program include monitoring federal land conveyance and management programs to identify particular navigability disputes, seeking cooperative resolution of navigability problems through negotiations and legislation, and preparing for statewide navigability litigation.

RIPARIAN RIGHTS AND STATUTE OF LIMITATIONS

Disputes over ownership of submerged lands in Alaska have arisen under a variety of circumstances. The principal source of the disputes in Alaska is the survey and acreage accounting system used by the federal government for conveying land to the state and native corporations.

The standard procedures for surveying and conveying federal land are found in the Manual of Instructions for the Survey of the Public Lands of the United States, generally known as the BLM Manual of Surveying Instructions. Under those procedures, consistently used in every public land state except Alaska, only uplands are surveyed and conveyed in fulfillment of acreage entitlements, not submerged lands. The survey rules require that all lakes 50 acres or larger, and rivers and streams three chains (198 feet) in width or wider, regardless of navigability, be meandered and segregated (excluded) from the surveyed public lands. Only the surveyed uplands are conveyed. The acreage of meandered rivers, lakes, and streams is not included in computing the amount of land involved in the conveyance.

In Alaska, however, the federal government had not consistently followed these survey rules. Until 1983, the federal government treated submerged lands the same as uplands. All bodies of water that were considered non-navigable by the federal government, regardless of size, were surveyed as though they were uplands and the acreage of submerged lands was charged against the total acreage entitlement.

Because of these conveyance procedures, the navigability of waterbodies in Alaska has been an issue of contention since the enactment of the Alaska Statehood Act and ANCSA. In addition to the problems caused by a lack of information about many waterbodies, the situation was exacerbated by the narrow definition of navigability used by the federal government. Hundreds of rivers, lakes, and streams considered navigable by the state were determined non-navigable by the federal government.

In 1983, following years of negotiations, lawsuits and legislative attempts to solve the navigability problems created by the unusual survey and conveyance procedures in Alaska, the State of Alaska, the United States Department of the Interior and the Alaska Federation of Natives (AFN) agreed that the standard rules of survey should be followed for land conveyances in Alaska. The effect of that decision was to treat Alaska surveys and land conveyances like federal land surveys and conveyances in other states. The recipients of conveyances from the federal government are charged only for the amount of public land that is calculated by the survey, which does not include the areas of meandered rivers, lakes and streams.

The use of these survey procedures has eliminated many of the problems associated with the federal land conveyance programs in Alaska. Submerged lands are no longer being conveyed to fulfill acreage entitlements. With the exception of lakes smaller than 50 acres and streams narrower than 198 feet, navigability determinations are no longer being made

prior to federal land conveyances. Determinations of ownership of submerged lands can be put off until a natural resource use or conflict requires resolution, such as issuance of an oil and gas lease, mining claim, or a gravel sale.

Through the joint efforts of the State of Alaska, AFN, and the Department of the Interior, the 1983 decision to use the standard survey procedures for land conveyances in Alaska was legislatively approved in August 1988 when the United States Congress passed legislation (94 Stat. 2430) amending Section 901 of the Alaska National Interest Lands Conservation Act, codified at 43 U.S.C. 1631. The 1988 amendment, sometimes referred to as the Alaska Submerged Lands Act, requires that the standard rules of survey in the BLM Manual of Surveying Instructions be used for all federal surveys under the Alaska Statehood Act and ANCSA. The 1988 amendment also repealed the Section 901 statute of limitations that would have required the state to file a lawsuit within a very short period of time in order to preserve its title to the beds of navigable waters conveyed to native corporations by the federal government as a result of erroneous navigability determinations, poor maps, surveys or whatever. Even with this legislation, a major problem concerning navigability decisions made by the federal government under the old system remains unresolved. At issue are the hundreds of erroneous non-navigability decisions and the resulting submerged land conveyances made to ANCSA corporations in previous years. In addition, to comply with the meandering requirements of the BLM Survey Manual, the federal government is still required to make navigability determinations for lakes smaller than 50 acres and rivers or streams narrower than 198 feet in width to determine if these waters must be meandered.

NAVIGABILITY CRITERIA

The greatest hurdle to overcome in the state's efforts to identify and manage navigable waters has been the long-

standing differences of opinion between the State of Alaska and the United States regarding the application of the test for determining title navigability. Navigability is a question of fact, not a simple legal formula. Variations in waterbody use that result from different physical characteristics and transportation methods and needs must be taken into account. There are many legal precedents for determining navigability in other states based upon the particular facts presented in those cases. In Alaska, though, we are just beginning to get the final court decisions that are necessary to provide legal guidance for accurate navigability determinations.

The physical characteristics and uses of a waterbody used by the state for asserting navigability, commonly referred to as navigability "criteria", are based upon legal principles that have been established by the federal courts. These criteria are applied to rivers, lakes, and streams throughout the state and take into account Alaska's geography, economy, customary modes of water-based transportation, and the particular physical characteristics of the waterbody under consideration.

The federal test for determining navigability was established over a hundred years ago. In the landmark decision of *The Daniel Ball*, 77 U.S. (19 Wall.) 557, 563, (1870), the Supreme Court declared:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

Although The Daniel Ball test is accepted as the correct standard for determining navigability, there has been a lot of disagreement over application of many of the terms and phrases used in The Daniel Ball test to the specific uses of

Alaska's lakes, rivers and streams. The State of Alaska uses the following interpretation of that test as the basis for its navigability program.

The Waterbody Must Be Usable As a Highway For the Transportation of People or Goods. Interpreting the requirements that navigable waterbodies be used or usable as "highways of commerce", the courts have ruled that the central theme of title navigability is that the waterbody be capable of use as a highway which people can use for transporting goods or for travel. Neither the types of goods being transported nor the purpose of the travel are important in determining navigability. Transportation on water associated with recognized commercial activities in Alaska, such as mining, timber harvesting, and trapping is, evidence of navigability. The use of waterbodies for transportation in connection with natural resources exploration or development, government land management, management of fish and game resources, or scientific research is also evidence of navigability. Travel by local residents or visitors for the purpose of hunting, fishing, and trapping, or as a means of access to an area can be used to establish navigability. The same holds for recreational transportation, including personal travel and professionally guided trips.

Waters Which Are Capable of Being Used For Transporting Persons and Goods, Although Not Actually Used, Are Navigable. It is not necessary that a waterbody be actually used for transportation to be found navigable. It is enough that it is susceptible, or physically capable, of being used. Whether a waterbody is susceptible of use for transportation depends upon the physical characteristics of the water course such as length, width, depth, and, for a river, current and gradient. If those physical characteristics demonstrate that a waterbody could be used for the transportation of persons or goods, it is legally navigable.

The susceptibility element of title navigability is very important for the identification of navigable waterbodies in Alaska. Because of Alaska's sparse population and lack of development, there are hundreds of remote rivers, lakes, and streams where there is little or no evidence of actual use. Because of their physical characteristics, however, many of these remote waterbodies could be used for transporting people or goods if there was a need. Under these circumstances, they are considered legally navigable.

Transportation Must Be Conducted In the Customary Modes of Trade and Travel On Water. A finding of navigability does not require use or capability of use by any particular mode of transportation, only that the mode be customary. The courts have held that customary modes of transportation on water include all recognized types and methods of water carriage. Unusual or freak contrivances adapted for use only on a particular stream are excluded. Customary modes of trade and travel on water in Alaska include, but are not limited to, barges, scows, tunnel boats, flat-bottom boats, poling boats, river boats, boats propelled by jet units, inflatable boats, and canoes. In places suitable for harvesting timber, the flotation of logs is considered a customary mode of transportation.

The mode of travel must also be primarily waterborne. Boats which may be taken for short, overland portages qualify. The courts have ruled that the use of a lake for takeoffs and landings by floatplanes is insufficient, in and of itself, to establish navigability.

Without expressly rejecting the claim, at least two court decisions in Alaska have suggested that winter travel on the surface of a frozen river or lake is probably not evidence of navigability. The rivers involved in the two adjudicated cases were both found navigable based upon summer use by boats, however, and it appears likely that most waterbodies in Alaska that are used as highways in winter can also be travelled by at

least small boats in the summer. Because of this, the state need not rely upon winter travel to support navigability.

Waters Must Be Navigable In Their Natural and Ordinary Condition. A waterbody which can be used for transportation only because of substantial man-made improvements to the condition of the watercourse is not navigable for title purposes. However, if transportation does or could occur on the waterbody even without the improvements and the improvements would only make transportation easier or faster or possible for larger boats (e.g., dredging), it is still considered navigable for title purposes.

The presence of physical obstructions to navigation (rapids, falls, log-jams, etc.) does not render a waterway non-navigable if the obstruction can be navigated despite the difficulties or if the obstruction can be avoided by other means, such as portaging, lining, or poling. A waterbody is also navigable even if seasonal fluctuations do not allow it to be navigated at all times of the year. However, a waterbody which is only navigable at infrequent and unpredictable periods of high water is not normally considered navigable. The fact that a waterbody may be frozen for several months of the year does not render it non-navigable if it is navigable in its unfrozen condition.

Title Navigability Is Determined As Of The Date Of Statehood. To be considered navigable for title purposes, the waterbody must have been navigable in 1959 (when Alaska became a state). This element of the navigability test focuses on the physical characteristics of the waterbody and whether those characteristics have changed significantly since statehood. Most waterbodies have not physically changed enough since statehood to alter their navigability. Assuming there have been no significant changes in the physical characteristics of the waterbody, a waterbody that is navigable today would be considered legally navigable in 1959 as well. Exceptions might include the creation, by natural or man-made

causes after statehood, of a totally new lake, river, or canal now used for navigation. Such a waterbody would not be considered navigable for title purposes. Conversely, a waterbody which was navigable in 1959 but, because of natural or man-made physical changes, is no longer navigable in fact would still be considered navigable for title purposes.

NAVIGABILITY CRITERIA DISPUTES

Because of differing legal interpretations of court navigability decisions, several aspects of the criteria used by the state to determine navigability have been disputed by the federal government. As a direct result of these criteria disputes, many waterbodies considered navigable by the state have been determined non-navigable by the federal government.

The major criteria dispute has been over the type or purpose of the transportation required to establish navigability. The federal government has asserted that a waterway must be used, or capable of use, for transporting commerce to be considered navigable. Other, "noncommercial" transportation uses are not considered sufficient to establish navigability. In this context, the federal government has claimed that the only relevant "commercial" transportation is the distribution of goods for sale or barter, or the transportation for hire of people or things. The federal government has admitted that professionally guided transportation on Alaska's rivers, lakes and streams constitutes commerce, but nevertheless has argued that the waters are not being used as a navigable "highway" when recreation is involved, but rather more as an amusement park. The federal government has therefore claimed that waters used only for commercial recreation are legally nonnavigable even though they may be navigable in fact.

Through the work of the state's navigability program, this definition has been repeatedly rejected by the courts, most recently in the Gulkana River case. *Alaska v. United States*,

662 F.Supp.455 (D,Alaska 1986), affirmed sub nom. *Alaska v. Ahtna, Inc.*, 891 F.2d 1401 (9th Cir. 1989). Applying the correct definition of navigability, many of the submerged lands that the federal government attempted to convey to ANCSA corporations should have been recognized as belonging to the state. The state appealed many conveyances to protect its title. As occurred in the Kandik-Nation Rivers appeal, Appeal of Doyon, 86 I.D. 692 (ANCAB 1979), Alaska Native Corporations also found it necessary to challenge erroneous federal determinations of non-navigability to insure they would not be deprived of any portion of their entitlement by being charged for submerged land owned by the state.

The federal government has also argued that aluminum boats, boats propelled by jet units, inflatable boats, and canoes are not customary modes of travel for the purpose of determining navigability in Alaska. As a result, many waterbodies navigated by these types of watercraft have been found legally non-navigable by the federal government. The claim is that these boats represent post-statehood technological advances, are too small to be considered "commercial", or that most "commercial" use of the watercraft developed after statehood.

Another navigability dispute involves remote, isolated lakes. The federal government has found many of these lakes legally non-navigable, even though they are physically capable of being navigated. The federal government's contention is that a navigable connection to another area is necessary to make travel on a remote lake worthwhile. Otherwise, the federal government views the lack of development in the area around the isolated lake as an indication that the lake will never be used for commercial transportation.

To resolve these navigability criteria disputes, the state has actively pursued a limited number of court cases challenging particular findings of non-navigability by the federal government. With the sole exception of floatplanes, the courts have

agreed with the navigability criteria presented by the State of Alaska and have rejected the limitations suggested by the federal government. These cases include:

Gulkana River. In this case, both in the U.S. District Court and on appeal to the U.S. Court of Appeals, the federal courts rejected the federal government's restrictive interpretation of the phrase "highway of commerce" in the title navigability test. The federal district court stated that to demonstrate navigability, it is only necessary to show that the waterbody is physically capable of "the most basic form of commercial use: the transportation of people or goods." Because the Gulkana River can be used for the transportation of people or goods, the Gulkana River was found navigable. *Alaska v. United States*, 662 F.Supp.455 (D.Alaska 1987). On appeal, the court of appeals affirmed the district court's finding of navigability. *Alaska v. Ahtna, Inc.*, 892 F.2d 1401 (9th Cir. 1989). The court of appeals found that the modern use of the Gulkana River for guided hunting, fishing, and sightseeing trips is a commercial use and, since the physical characteristics of the river have not significantly changed since 1959, provides conclusive evidence that the river was susceptible of commercial use at statehood. The court also found that modern inflatable rafts can be used to establish navigability. In April 1990, the United States Supreme court denied a request by Ahtna, Inc. to reconsider and overturn the court of appeals decision. The Gulkana River precedent is now binding on all future navigability determinations in Alaska.

Kandik and Nation Rivers. In this administrative appeal, the State of Alaska and Doyon Limited, an ANCSA regional corporation, successfully established that the use or susceptibility of use of a river or stream by an 18-24 foot wooden riverboat capable of carrying at least 1,000 pounds of gear or supplies is sufficient to establish

navigability. Based upon the use of these types of boats for the transportation of goods and supplies by fur trappers, as well as extensive historic and contemporary canoe use, the court found the Kandik and Nation rivers, in Interior Alaska, navigable. Appeal of Doyon, 86 LD. 692 (ANCAB 1979).

Alagnak River. In this federal district court case, the Alagnak River, the Nonvianuk River, Kukaklek Lake and Nonvianuk Lake were all found navigable. These interconnected waterbodies are located in the Bristol Bay region of Alaska, south of Lake Iliamna. Their primary transportation use is for commercially guided hunting, fishing, and sightseeing and for government research and management. They also serve as a means of access for local residents to their homes and to the surrounding areas for subsistence hunting and fishing. After several years of litigation, the federal government conceded that these rivers and lakes are navigable. *Alaska v. United States*, No. 82-201 (D.Alaska Feb. 2, 1985).

Matanuska River. The recommended decision in this administrative appeal agreed with the State of Alaska's position that post-statehood commercial river rafting operations are sufficient to establish navigability. Based upon that type of use, the administrative law judge who heard the case recommended that the Matanuska River, in Southcentral Alaska, be found navigable. The Secretary of Interior, over the state's objections, assumed jurisdiction over the case and stayed implementation of the recommended decision. No action has been taken in the case since that time. Appeal of Alaska, No. 82-1133 (IBLA Rec. Decision Aug. 18, 1983)

Slopbucket Lake. The state claimed that the extensive use of floatplanes on Slopbucket Lake, a twenty acre lake adjacent to Lake Iliamna, was sufficient to establish navigability. The federal courts rejected this view. The

courts reasoned that floatplanes do not use the lake as a navigable highway; they just take off and land there. *Alaska v. United States*, 754 F.2d 851 (9th Cir.) cert denied, 106 S. Ct. 333 (1985).

IDENTIFICATION OF NAVIGABLE WATERS

Even if the criteria for determining navigability in Alaska were totally agreed upon, it still would be difficult to prepare a complete list of all of the navigable lakes, rivers, and streams in the state. Much of Alaska has not yet been surveyed and many maps are inaccurate and out-of-date. It is an immense and complex task simply to identify and locate all of the thousands of named and unnamed lakes, rivers, and streams in the state which might be considered navigable. Furthermore, once a potentially navigable lake, river, or stream has been identified, detailed information about its size and uses is necessary for an accurate navigability determination. Because of Alaska's undeveloped and remote character, gathering navigability information is both time consuming and expensive. Finally, administrative navigability determinations made by the state or the federal government are always subject to legal challenge, since only the courts can authoritatively determine title to submerged lands.

Despite these difficulties, both the state and the federal government are frequently called upon to issue navigability determinations. Although the requirement that BLM adhere to the meandering requirements of the BLM Survey Manual has eliminated the need for navigability determinations on the larger rivers, lakes, and streams, which must now be meandered regardless of navigability, navigability determinations are still required for the smaller rivers, lakes, and streams to determine if they are to be meandered at the time of survey. Because of this, some navigability determinations are still made for nearly every federal land conveyance under ANCSA or the Alaska Statehood Act. The management plan for nearly

every federal Conservation System Unit (CSU) also addresses the navigability issue.

Federal navigability determinations are reviewed by the state to insure that available information sources were used and interpreted correctly. Where the federal government determines non-navigable a waterbody which is considered navigable by the state, the state may provide the government with supplemental information about the uses and characteristics of the waterbody to obtain a redetermination of navigability.

Under some circumstances the state needs to make its own navigability determinations, such as for a oil and gas lease sale, land disposal, material sale, mining claim, or another use of state land or resources requiring a determination of ownership of submerged lands within the affected area.

For large, undeveloped regions of Alaska there may be little or no accurate waterbody use or physical characteristics information available for making navigability determinations. When information is lacking, and it must make a navigability determination, the state is forced to rely solely upon the physical characteristics shown on maps and aerial photographs. In these cases, the state identifies as navigable all streams depicted on the U.S.G.S. maps with double lines (generally at least 70 feet wide) and having an average gradient over the length of the stream of no more than 50 feet per mile. With rare exceptions, the state's experience has been that streams of this type are deep enough and wide enough to be navigable by boats carrying persons or goods and must, therefore, be considered legally navigable. Streams depicted with single lines, although narrower in width, may also be listed as potentially navigable if they have gradients of substantially less than 50 feet per mile and are at least 10 miles.

If there is no public use or physical characteristics information readily available for lakes, those lakes which are shown on maps and aerial photographs as having a navigable water

connection with other navigable waters, or which are accessible by short overland portages, are considered navigable regardless of the size of the lake. These lakes are part of a system of interconnected navigable waters. If a lake is totally isolated, it will be included on the state's navigability maps if it is at least 1 1/2 miles long. That length insures that the lake can be used as a "highway". Future judicial decisions interpreting the "highway" requirement for isolated lakes could shorten or lengthen this 1 1/2 mile "rule of thumb."

The state recognizes that, under some circumstances, lakes smaller than 1 1/2 miles long can be and are used as navigable highways. In those cases, when known, these smaller lakes are also depicted on the state's navigability map. Moreover, as a matter of administrative policy and convenience only, the state may sometimes make an exception to the 1 1/2 mile standard in the extremely wet regions of the state, including some areas in the Yukon-Kuskokwim Delta, Yukon Flats, and on the North Slope. In these areas, an isolated lake might need to be 2-3 miles long to be included on the state's navigability maps. Although smaller lakes in these areas are capable of being used for transportation and should be found navigable by the courts, the state has decided to concentrate its limited resources in protecting the larger waterbodies first.

NAVIGABLE WATERS WITHIN PRE-STATEHOOD FEDERAL WITHDRAWALS

Although disputes over which waters in Alaska are navigable are the most frequent cause of submerged land ownership disputes, there is another major legal issue which poses a threat to Alaska's sovereign claim to the beds of navigable waters. Even where navigability is conceded, the federal government often contends that title to the submerged lands did not vest in the state if the area was withdrawn or reserved by the federal government on the date of statehood. Within native conveyance areas, the federal government has used this claim of "reserved submerged lands" to justify its attempts to

convey the beds of navigable waters in fulfillment of the native entitlements. Within state selections, the federal government has used the same claim to charge the acreage of submerged lands against the state's entitlement.

The state strongly disagrees with this federal claim and has actively pursued a number of court challenges to resolve the issue. In addition to numerous appeals from federal decisions to convey or charge for the beds of navigable waters, the state was actively involved as a friend of the court in one case before the United States Supreme Court and continues to be involved in another Supreme Court case which presents this issue. The pending case is *United States v. Alaska*, U.S. Supreme Court 84 Original (filed June, 1979).

On June 8, 1987 the Court issued its decision in *Utah v. United States*, No. 85-1772 (filed Oct. 14, 1986). In this case the federal government, in 1976, issued oil and gas leases for land underlying Utah Lake, a navigable waterbody located in Utah. The suit sought a declaratory judgement that Utah, rather than the United States, holds the lands under navigable waters in the territories in trust for future states, and, absent a prior conveyance by the federal government to third parties, a state acquires title to such land upon entering the Union on an "equal footing" with the original 13 states.

The Supreme Court held that title did pass to the state upon Utah's admission to the Union. They held that there is a strong presumption against finding congressional intent to defeat a state's title, and, that in light of the longstanding policy of the federal government's holding land under navigable waters for the ultimate benefit of future state absent exceptional circumstances, an intent to defeat a state's equal footing entitlement could not be inferred from the mere act of the reservation itself. The United States would not merely be required to establish that Congress clearly intended to include land under navigable waters within the federal reservation, but would

additionally have to establish that Congress affirmatively intended to defeat the future state's title to such land.

This decision has significant ramifications within Alaska, since over 95 million acres—more than 25% of the total area of the state—was enclosed within various federal withdrawals and reservations at the time Alaska became a state.

NAVIGABLE WATERS WITHIN ANILCA CONSERVATION SYSTEM UNITS

On December 2, 1980, the Alaska National Interest Lands Conservation Act became law. This act created or added 104.3 million acres to various federal conservation system units. Because these "withdrawals" occurred after the date of statehood, there is no disagreement between the state and federal governments that navigable waters within the various CSU's are owned by the state. However, there is some disagreement on the amount of authority the federal land managers may have to regulate these state owned submerged lands.

The U.S. Constitution gives Congress certain limited powers to control uses on state owned submerged land. These are known as the Property Clause, Navigational Servitude and the Commerce Clause. The extent of these powers involves complex legal questions. However, even assuming that Congress has the power to regulate state-owned submerged lands in Alaska, the United States Supreme Court has ruled that Congress may choose not to exercise that power, thus leaving regulation totally up to the state. *Escanaba Co. v. Chicago*, 107 U.S. (17 Otto.) 678 (1883). Whether Congress has done that can only be determined by examining the federal laws passed by Congress dealing with Alaska lands. Another possibility is that the state and federal governments have concurrent jurisdiction, sharing the authority to regulate submerged lands.

In ANILCA, Congress did not take away the state's power to regulate state-owned submerged lands within federal CSU's

in Alaska. Numerous provisions in ANILCA recognize and respect the state's authority over state-owned land. In some cases, however, Congress may have attempted to give the federal land managers some concurrent authority to regulate navigable waters within CSU's.

The state, where possible, cooperates with rather than confronts the federal land managers. This cooperation often takes the form of a memorandum of understanding that discusses management issues and how they will be resolved. Differences do occur, however, over issues such as column management and restrictions on mining.

II. LEGAL AND POLICY GUIDELINES GOVERNING MANAGEMENT OF SUBMERGED LANDS AND PUBLIC WATERS PUBLIC TRUST DOCTRINE

The state has special duties and management constraints with respect to state-owned land underlying navigable waters. These special duties and management constraints arise from the Alaska Constitution. The Alaska Constitution contains numerous provisions embracing the principles commonly known as the public trust doctrine. The public trust doctrine is remarkable both for its age and for its vigor. Rooted in the customs of the seafaring Greeks and Romans, it has evolved to become one of the most effective safeguards of public rights. Basically, the trust reflects an understanding of the ancient concept that navigable waters, their beds and their banks, should be enjoyed by all the people because they are too important to be reserved for private use.

In America, the concept of public rights to public waters was recognized since the early days of the Massachusetts Bay Colony where the great Pond Ordinance of 1641 guaranteed the right to fish and fowl in ponds greater than 10 acres, along with the freedom to pass through private property to do so.

By 1821, American courts were pronouncing the law of public trust as we know it today. This does not mean that no water-related development can take place. The public trust doctrine permits states to improve waterways by constructing ports, docks and wharves, thus furthering the purposes of the trust. Generally speaking, the people's trust rights may be alienated only in ways that further overall trust uses, and in relatively small parcels.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1882), involved a grant by the State of Illinois of one thousand acres of the bed of Lake Michigan, constituting the entire harbor of the City of Chicago, to the Illinois Central Railroad. The U.S. Supreme Court held that the grant was revocable, that the state held the land in trust for the public, and that it was powerless to relinquish its rights as trustee.

The court went on to say that land underlying navigable waters is much more than a simple property right.

[I]t is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States holds in the public lands which are open to preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties . . . The trust devolving upon the state for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

In the 19th century the purposes of the trust were generally described as "commerce, navigation and fishery." This was logical because the major waterways were essential highways of commerce. But as other values became increasingly important, courts began to recognize recreation and environmental protection among the purposes for which the trust exists. As a

California court said in 1971, "with our ever increasing leisure time . . . and the ever increasing need for recreational areas it is extremely important that the public need not be denied use of recreational water . . . the rule is that a navigable stream may be used by the public for boating, swimming, fishing, hunting and all recreational purposes." *People ex rel. Baker v. Mack*, 19 Cal. App. 3d 1040, 1044 (1971).

The Alaska constitution provides protections similar to the public trust doctrine protections that cannot be disregarded by the legislature or overruled by the courts. Article VIII, Sec. 3 provides; "Wherever occurring in their natural state, fish, wildlife and waters are reserved to the people for common use." After reviewing the public trust doctrine in *Owsichuk v. State*, Guide Licensing, 763 P.2d 488 (Alaska 1988), the Alaska Supreme Court explained that "the common use clause was intended to engraft in our constitution certain trust principles guaranteeing access to the fish, wildlife and water resources of the state."

In *CWC Fisheries, Inc. v. Bunker*, 755 P.2d 1115 (Alaska 1988), the Alaska Supreme Court applied the public trust doctrine to tidelands, holding that, even after conveyance, the title remains subject to continuing public easements for purposes of navigation, commerce and fishery.

The 1985 Alaska legislature recognized the constitution application of public trust doctrine principles in Alaska. In an Act relating to the public or navigable waters of the state, the legislature found that "the people of the state have a constitutional right to free access to the navigable or public waters of the state" and that the state "holds and controls all navigable or public waters in trust for the use of the people of the state". 85 SLA Ch. 82. In the same act, the legislature ruled that submerged lands are "subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purpose for which the water is used or capable of being used consistent with the public trust."

Courts in other states over the years have defined in somewhat different ways the public uses that are permitted and protected by the public trust as it applies to submerged lands. In reviewing these other cases, it can clearly be seen that through time an ever expanding definition of the public uses protected by the public trust doctrine is being adopted. The California Supreme Court recently held that:

Although early cases had expressed the scope of the public's right in (lands subject to the public trust) as encompassing navigation, commerce and fishing, the permissible range of public uses is far broader, including the right to hunt, bathe or swim, and the right to preserve the (public trust) lands in their natural state as ecological units for scientific study. *City of Berkeley v. Superior Court of Alameda*, 606 P.2d 362, 365 (Cal. 1980)

It is clear under the Alaska Constitution that the State of Alaska has the responsibilities of a trustee with respect to management of land underlying navigable waters. Moreover, the Alaska legislature has adopted a broad view of the public uses protected or permitted by the public trust. Accordingly, the Alaska Attorney General's Office has determined that, until the Alaska Supreme Court rules on the question, the state should assume that a broad definition of public rights protected by the Alaska Constitution and the public trust doctrine applies in Alaska, similar to the one adopted by the California Supreme Court. 1982 Atty. Gen. Op. No. 3 (June 10, 1982).

PUBLIC WATERS

It is not only the beds of navigable waters in Alaska that are reserved in public ownership for public use. Under article VIII, Section 3 of the Alaska Constitution, all waters occurring in their natural state are reserved to the people for common use. Article VIII, Section 14 of the Alaska Constitution also provides for the broadest possible access to and use of state waters by the general public.

Section 14. Access to Navigable Waters. Free access to the navigable or public waters of the state, as defined by the legislature, shall not be denied any citizen of the United States or resident of the state, except that the legislature may by general law regulate and limit such access for other beneficial uses or public purposes.

Pursuant to this grant of authority, the Alaska State Legislature, in AS 38.05.365(12), defined "navigable waters" as follows:

"navigable waters" means any water of the state forming a river, stream, lake, pond, slough, creek, bay, sound, estuary, inlet, strait, passage, canal sea or ocean, or any other body of water or waterway within the territorial limits of the state or subject to its jurisdiction, that is navigable in fact for any useful public purpose, including but not limited to water suitable for commercial navigation, floating of logs, landing and takeoff of aircraft, and public boating, trapping, hunting waterfowl and aquatic animals, fishing, or other public recreational purposes.

This definition of navigable waters does not define state ownership of submerged land in Alaska. The definition of navigability for ownership purposes was discussed earlier in this paper. This definition, however, does define what types of waterbodies in Alaska are available for public use under the Alaska statutes.

The Alaska State Legislature has broadly construed the constitutional protections for public use of the waters of the state. In an Act (85 SLA chap. 82, codified as AS 38.05.128) relating to the navigable or public waters of the state, the state legislature found:

- (a) The people of the state have a constitutional right to free access to the navigable or public waters of the state.

(b) Subject to the federal navigational servitude, the state has full power and control of all of the navigable or public waters of the state, both meandered and unmeandered, and it holds and controls all navigable or public waters in trust for the use of the people of the state.

(c) Ownership of land bordering navigable or public waters does not grant an exclusive right to the use of the water and any rights of title to the land below the ordinary high water mark or subject to the rights of the people of the state to use and have access to the water for recreational purposes or any other public purposes for which the water is used or capable of being used consistent with the public trust.

(d) This Act may not be construed to affect or abridge valid existing rights or create any right or privilege of the public to cross or enter private land.

AS 38.05.128 provides:

OBSTRUCTIONS TO NAVIGABLE WATER

(a) A person may not obstruct or interfere with the free passage by a member of the public on any navigable water as defined in AS 38.05.965 unless the obstruction or interference is:

(1) authorized by a federal or state agency; (2) authorized under a federal or state law or permit; (3) exempt under 33 U.S.C. 1344(f) (Clean Water Act); (4) caused by the normal operation of freight barging that is otherwise consistent with law; or (5) authorized by the commissioner after reasonable public notice.

(b) A violation of (a) of this section is a class B misdemeanor.

(c) An unauthorized obstruction or interference is a public nuisance and is subject to abatement. The cost of abatement

shall be borne by the violator and is in addition to any penalty imposed by the court.

(d) This section may not be construed to affect or abridge valid existing rights.

Thus, under the Alaska Constitution and this statute, any surface waters capable of use by the public defined in AS 38.05.365(12) are available to the public, irrespective of streambed ownership. Further, such public use is not considered a taking and is not subject to inverse condemnation action. Private ownership is subject to the public rights that are protected by the public trust.

In two Montana Supreme Court cases involving the nature of public rights where the submerged lands are privately owned, the court rules that public portaging, anchoring, and other uses incidental to the use of the water are allowed. The court also found that if travel on the water or streambed is obstructed, the public is allowed to use the adjacent private land to portage around the barrier in the least intrusive way possible, avoiding damage to the property holder's rights. However, the public does not have the right to enter into or trespass across private property in order to enjoy the recreational use of state-owned waters. The State of Alaska agrees with this ruling and believes a similar ruling would be made by our state courts.

BOUNDARIES OF NAVIGABLE WATERS

The state is often asked where public ownership of water bodies ends and private ownership begins. There are two types of water body boundaries to address: 1) non-tidal water boundaries and 2) tidal water boundaries. Non-tidal boundaries are boundaries of lakes, rivers, and streams. Tidal boundaries are the boundaries along any body of water which is influenced by the rise and fall of the tides.

Non-tidal Water Boundaries. The boundary between public and private ownership is the "Ordinary High Water Mark"

which is defined in 11 AAC 53.900(23) as being—The mark along the bank or shore up to which the presence and action of the non-tidal water are so common and usual, and so long continued in all ordinary years, as to leave a natural line impressed on the bank or shore and indicated by erosion, shelving, vegetation, or other distinctive physical characteristics. Also see the Alaska State Supreme Court definition in *Department of Natural Resources v. Pankrantz* 538 P.2d 984, 988-89 (Alaska 1975). The ordinary high water line can usually be observed by the laymen simply by noting the vegetation line or well defined stream banks.

Tidal Water Boundaries The boundary between tidal water bodies and private/public owned uplands is the Mean High Water Line. Mean high water line as defined by 11 AAC 53.900(15) is: The tidal datum plane of the average of all the high tides, as would be established by the National Geodetic Survey, at any place subject to tidal influence.

This line is not readily observable because it is a line of known elevation which intersects the land surface. The mean high water line can be a considerable distance below the vegetation line because extreme high water will denude the beach above the line of mean high water. The only way that the location of mean high water line can be accurately determined is by differential leveling from known bench marks or by operating a tide gauge for a sufficient period of time to determine the mean high water elevation. The line of mean high water line can be approximated by time coordinated observations of the daily predictions for high and low waters, predicted by NOAA, as they relate to the published mean high water elevation. This method can be highly unreliable because small errors in the predictions or observations can transform into large errors in the horizontal location; this is especially true in areas where the beach gradient is very flat.

It is important to note that in some areas, such as Prince William Sound, the mean high water line boundary is con-

siderably higher than the current mean high water line because the boundary became fixed at the 1964 pre-quake location. In this instance the boundary between state-owned tidelands and the uplands would be established at an elevation which equals the sum of the mean high water elevation plus the published amount of uplift or, in some cases, submergence.

CONCLUSION

This paper describes the state's policies and procedures for managing and protecting state submerged lands and public waters. As further legal and practical developments occur in this area, these policies and procedures will be reexamined by the state and, if necessary, appropriate changes will be made.